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*The Pretend Solution: An Empirical Study of  
Bankruptcy Outcomes*

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# The Pretend Solution: An Empirical Study of Bankruptcy Outcomes

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## I. Introduction

Bankruptcy is an integrated legal solution to the problem of overwhelming debt. Evidence suggests that the architects of the modern Bankruptcy Code, in 1978, were genuinely concerned about offering ample relief to American families to cope with the burgeoning, emerging consumer-credit economy.<sup>1</sup> A few years before, the Brookings Institution had released a landmark study documenting gaping holes in the existing structure, consisting of bankruptcy law and a patchwork of state laws.<sup>2</sup> The study noted that many types of debts could not be discharged in bankruptcy and that the bankruptcy process provided almost no effective treatment for problems in paying debts secured by collateral, such as home mortgages or car loans.<sup>3</sup> Aggressive garnishment laws and strong rights for secured creditors led many people to file bankruptcy under creditor duress, often without sufficient contemplation of their options.<sup>4</sup> The 1973 Bankruptcy Review Commission Report recommended major changes to the bankruptcy laws to give consumers more help with their debt problems.<sup>5</sup> These recommendations focused on encouraging consumers to consider repayment as an alternative to straight liquidation bankruptcy.<sup>6</sup> The Commission warned that dramatic reforms were needed to provide more relief to individuals in financial trouble because the existing bankruptcy system was inadequate.<sup>7</sup>

In reaction to these criticisms and empirical findings, the drafters of the 1978 Bankruptcy Code—and the legal advocates who advised them—designed a complex system to help consumers. Even in 1978, household finance was complicated. Consumers in financial trouble were delinquent on both secured and unsecured debts; these debts were owed to a mix of government-guaranteed and private lenders, had different maturities, and

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1. See William T. Vukowich, *Reforming the Bankruptcy Reform Act of 1978: An Alternative Approach*, 71 GEO. L.J. 1129, 1132 (1983) (noting that Congress “modernized” the bankruptcy laws in 1978 in response to a noticeable increase in consumer credit during the mid-twentieth century). The Bankruptcy Code resulted from more complex political considerations than just a two-sided conflict between debtor interests and creditor interests. See generally Eric A. Posner, *The Political Economy of the Bankruptcy Reform Act of 1978*, 96 MICH. L. REV. 47 (1997) (arguing that a “satisfactory explanation of the Bankruptcy Code must take into account the interests of all relevant parties and the extent of their political power”).

2. DAVID T. STANLEY & MARJORIE GIRTH, BROOKINGS INST., *BANKRUPTCY: PROBLEM, PROCESS, REFORM* (1971).

3. *Id.* at 57–58 (“If much of his debt is secured, a bankrupt will gain little from his discharge, because it does not affect valid liens. After bankruptcy he will either have to pay his secured creditors or possibly have the property repossessed.”).

4. *Id.* at 47–53 (reporting that the main immediate cause of bankruptcy was a threat of legal action such as garnishment, repossession, or a lawsuit).

5. REPORT OF THE COMMISSION ON THE BANKRUPTCY LAWS OF THE UNITED STATES, H.R. DOC. NO. 93-137, at 11–14 (1973) [hereinafter 1973 COMMISSION REPORT].

6. *Id.* at 157–60.

7. See *id.* at 2–5 (describing several problems with the bankruptcy system that led to the establishment of the Commission).

bore different interest rates and fees.<sup>8</sup> With disparities in state laws, creditors had varying enforcement tools available to them to exert leverage on struggling debtors. The 1978 Bankruptcy Code offered consumers complex, sophisticated tools to address their debt problems. Consumers were given their choice of two chapters of bankruptcy relief: Chapter 7 (liquidation) and Chapter 13 (debt repayment over three to five years). This new, improved system, which bifurcated options, offered families in financial trouble a rich array of tools to eliminate, reduce, or restructure debts.<sup>9</sup>

The creation of Chapter 13 was seen as a cornerstone of the improved system of legal relief for consumers.<sup>10</sup> The 1973 Commission Report had enthusiastically recommended the expansion of the repayment bankruptcy system, concluding that “[n]o feature of the present Bankruptcy Act has received as much general acclaim as Chapter XIII.”<sup>11</sup> On the Commission’s advice,<sup>12</sup> the drafters of the Bankruptcy Code added numerous additional features to the prior Chapter XIII, including christening it with a new Arabic numeral in its name. These additional features were intended to improve the relief that bankruptcy provided to financially distressed individuals.<sup>13</sup> The new Chapter 13 clarified that no minimum amount of repayment was required, loosened eligibility requirements for debtors, and added significant tools to permit debtors to catch up on missed payments for secured debts.<sup>14</sup>

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8. See Carl J. Palash, *Household Debt Burden: How Heavy Is It?*, FRBNY Q. REV., Summer 1979, at 9, 10–12 (charting the distribution of household debt and discussing consumer delinquency); David F. Seiders, Fed. Reserve, Div. of Research & Statistics, *Recent Developments in Mortgage and Housing Markets*, 65 FED. RES. BULL. 173, 178–79, 184 (1979) (surveying changes to the lending market and noting the increase in private lenders).

9. See *infra* Part II.

10. This sentiment was reflected in the Senate Report for the enacting statute:

In theory, the basic purpose of Chapter XIII has been to permit an individual to pay his debts and avoid bankruptcy by making periodic payments to a trustee under bankruptcy court protection, with the trustee fairly distributing the funds deposited to creditors until all debts have been paid. The hearings record and the bankruptcy literature show uniform support for this principle. In practice however, the results have been less than satisfactory, even though chapter XIII has been available since 1938.

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The new chapter 13 undertakes to solve these problems insofar as bankruptcy law can provide a simple yet precise and effective system for individuals to pay debts under bankruptcy court protection and supervision.

S. REP. NO. 95-989, at 12–13 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5798–99.

11. 1973 COMMISSION REPORT, *supra* note 5, at 157.

12. See *id.* at 162–67 (recommending improvements to Chapter XIII).

13. TERESA A. SULLIVAN, ELIZABETH WARREN & JAY LAWRENCE WESTBROOK, AS WE FORGIVE OUR DEBTORS: BANKRUPTCY AND CONSUMER CREDIT IN AMERICA 232–33 (1989) [hereinafter AS WE FORGIVE].

14. See Melvin Kaplan, *Chapter 13 of the Bankruptcy Reform Act of 1978: An Attractive Alternative*, 28 DEPAUL L. REV. 1045, 1047–51 & nn.23, 34 (1979) (describing the new debtor-eligibility requirements, noting that the new Chapter 13 only mandated specific payments to a small subset of creditors, and explaining the debtor’s ability to cure or waive defaults on secured debts in a Chapter 13 plan, even over creditor objections).

Additionally, debtors no longer needed the consent of their creditors to reduce their debt obligations.<sup>15</sup>

Advocates, academics, judges, and legislators heralded the 1978 Bankruptcy Code as a consumer protection victory.<sup>16</sup> At the center of the celebration was Chapter 13. Law review articles announced that the “underlying premise” of the reform was to relegate Chapter 7 to a last-resort option and that some practitioners would realize that Chapter 13 was “an inexpensive, effective means” of helping debtors.<sup>17</sup> Congress had given consumers substantially more relief, essentially promising all that the prior Chapter VII and Chapter XIII options had provided, and then some. One commentator has described the “myth” of the enactment of Chapter 13 as follows:

Once upon a time, a benevolent government passed a law to help poor but honest debtors protect their homes from foreclosure and their encumbered personal property from repossession. . . . [T]he idea was for [Chapter 13] debtors to be able to complete their plans successfully, then all could live happily ever after . . . .<sup>18</sup>

The exaltation of Chapter 13 in part reflected the success of bankruptcy experts in getting their recommended changes enacted into law. The 1973 Commission Report devoted most of its recommendations to a legal redesign that would encourage debtors to file repayment bankruptcies.<sup>19</sup> The Commission Report also fully embraced the concept of consumers making informed, uncoerced choices about how best to rehabilitate their households—a vision of legal relief reflected in offering debtors two options

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15. See *id.* at 1050–51 & nn.52–54 (outlining the new “cram down” provision of Chapter 13).

16. See, e.g., *Consumer Debt: Hearing Before the H. Comm. on Banking & Fin. Servs.*, 104th Cong. 385 (1996) (statement of Ford Elsaesser, Vice President, American Bankruptcy Institute) (“When Congress created the modern bankruptcy code in 1978, it made bankruptcy a much more debtor-friendly law.”); Tamar Lewin, *Business and the Law: Lively Debate on Bankruptcy*, N.Y. TIMES, Aug. 9, 1983, at D2 (reporting that consumer advocates declared the Bankruptcy Reform Act of 1978 a victory).

17. E.g., Kaplan, *supra* note 14, at 1058.

18. Gordon Bermant, *What Is “Success” in Chapter 13? Why Should We Care?*, AM. BANKR. INST. J., Sept. 2004, at 20, 20. Before the 1978 Bankruptcy Code, the federal government had apparently preferred Chapter XIII, but it remained frequently used only in some areas. See Max Siporin, *Bankrupt Debtors and Their Families*, SOC. WORK, July 1967, at 51, 53 (“Although the Administrative Office of the United States Courts strongly favors the use of Chapter XIII proceedings when feasible, only a handful of the district courts are partial to this plan . . .”).

19. The Commission Report contained an entire chapter on “Plans for Debtors with Regular Income” despite only a tiny fraction of cases being filed under the then-existing Chapter XIII. See 1973 COMMISSION REPORT, *supra* note 5, at 157–67 (discussing various recommendations in light of the Commission’s conviction that usage of Chapter XIII “should be fostered,” and noting the Commission’s goals were “to discover reasons why Chapter XIII has not been more popular” and to “enhanc[e] the effectiveness of [Chapter XIII] without making it compulsory”). Even a contemporary critique of the 1978 Bankruptcy Code offered suggestions for further reforms that would continue to “result in greater use of and larger repayment plans in chapter 13.” Vukowich, *supra* note 1, at 1132.

for bankruptcy.<sup>20</sup> In the aftermath of the enactment of the 1978 Bankruptcy Code, a “national campaign to sell judges, attorneys, and ultimately debtors on the benefits of Chapter 13” was launched.<sup>21</sup> As one law journal opined, “Chapter 13 often offers a far more effective solution to a debtor’s problems than a straight liquidation under Chapter 7.”<sup>22</sup> And indeed, Chapter 13 filings skyrocketed during the first years under the 1978 Bankruptcy Code, increasing from about 15% of all consumer filings in 1978 to nearly 30% by 1982.<sup>23</sup> For the last two decades, approximately one-third of all consumer filings have been in Chapter 13.<sup>24</sup>

The first major study of consumer bankruptcy relief under the 1978 Bankruptcy Code halted the victory celebration. Teresa Sullivan, Elizabeth Warren, and Jay Westbrook’s book *As We Forgive Our Debtors*, published in 1989, documented that many of the improvements in the law were not translating into on-the-ground relief for families. Their most controversial finding was that only one in three cases filed under Chapter 13 ended in a completed payment plan.<sup>25</sup> Two out of three families did not receive a Chapter 13 discharge. This modal outcome was contrary to the careful statutory scheme of court-approved debt reduction, development of a budget, repayment over a period of years, and discharge of any remaining obligations.<sup>26</sup> Mincing no words, *As We Forgive Our Debtors* concluded, “In short, there are a lot of people in bankruptcy who bought a bill of goods when they filed Chapter 13. These Chapter 13 failures were cheated by a system that made unjustified promises of successful repayments and reestablished creditworthiness, and then left them to founder alone.”<sup>27</sup> This critique of the discharge rate for Chapter 13 was driven in large part by comparison to the alternative of Chapter 7, which has consistently had a discharge rate exceeding 95%. The one-in-three success rate of Chapter 13 paled against Chapter 7 outcomes.

The sting of the Chapter 13 critique was compounded by a cost comparison. Not only did Chapter 13 deliver little protection to most of those who turned to it for help, but the complexity of Chapter 13 meant that the attorney’s fees were significantly higher than for Chapter 7.<sup>28</sup> The

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20. 1973 COMMISSION REPORT, *supra* note 5, at 79–81.

21. AS WE FORGIVE, *supra* note 13, at 339.

22. C. William Schlosser, Jr., *Chapter 13 Bankruptcy as an Alternative to Chapter 7*, 18 COLO. LAW. 2089, 2089 (1989).

23. AS WE FORGIVE, *supra* note 13, at 266 n.13 (citing JUDICIAL CONFERENCE OF THE U.S., ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 402 tbl.F3B (1982)).

24. For spreadsheets containing annual statistics on the number of total filings and filings under each chapter of the Bankruptcy Code, see *Bankruptcy Statistics*, ADMIN. OFF. U.S. COURTS, <http://www.uscourts.gov/Statistics/BankruptcyStatistics.aspx>.

25. *Id.* at 217.

26. See AS WE FORGIVE, *supra* note 13, at 37–39 (describing the detailed procedure for plan confirmation and discharge).

27. *Id.* at 339.

28. *Id.* at 250.

difference has persisted over time. In 2007, the median cost of a Chapter 13 bankruptcy was \$2,500, 250% higher than the cost of a Chapter 7 case.<sup>29</sup> Chapter 13 also requires significantly more debtor involvement, typically including a court appearance for plan confirmation and the submission of regular payments for a period of years.<sup>30</sup> By contrast, debtors usually get a discharge in Chapter 7 within four months of filing.<sup>31</sup>

Defenders of Chapter 13 were furious.<sup>32</sup> Their friends in Congress pushed for an official government study of the issue, presumably to disprove Sullivan, Warren, and Westbrook. A few years later, however, the resulting report confirmed that only one in three debtors obtained a discharge.<sup>33</sup> In the face of repeated studies that confirmed the original Sullivan, Warren, and Westbrook finding,<sup>34</sup> an alternate theory of bankruptcy emerged. Advocates for Chapter 13 began to opine that the discharge rate was a poor measure of

29. The median Chapter 13 filer in 2007 paid \$2,500; the median Chapter 7 filer in 2007 paid \$1,000. Katherine Porter, *Driven by Debt: Bankruptcy and Financial Failure in American Families*, in BROKE: HOW DEBT BANKRUPTS THE MIDDLE CLASS (Katherine Porter ed., forthcoming 2012) [hereinafter BROKE] (manuscript at 1, 20) (on file with author). Using standard “no-look” fees in each district, a government study found that the median fee for Chapter 13 one year later in 2008 was \$3,000. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-08-697, BANKRUPTCY REFORM: DOLLAR COSTS ASSOCIATED WITH THE BANKRUPTCY ABUSE PREVENTION AND CONSUMER PROTECTION ACT OF 2005, at 24–26 (2008).

30. AS WE FORGIVE, *supra* note 13, at 37–38.

31. See ADMIN. OFFICE OF THE U.S. COURTS, STATISTICS DIV., OFFICE OF JUDGES PROGRAMS, 2010 REPORT OF STATISTICS REQUIRED BY THE BANKRUPTCY ABUSE PREVENTION AND CONSUMER PROTECTION ACT OF 2005, at 13 (2010) [hereinafter 2010 BAPCPA REPORT], available at <http://www.uscourts.gov/uscourts/Statistics/BankruptcyStatistics/BAPCPA/2010/2010BAPCPA.pdf> (reporting that for Chapter 7 consumer cases filed on or after October 17, 2006, and closed in 2010, the mean interval from filing to disposition was 178 days and the median interval was 120 days); AS WE FORGIVE, *supra* note 13, at 33, 44 n.26 (reporting that the median time from filing under Chapter 7 to discharge was four months in the study sample); *Discharge in Bankruptcy*, U.S. COURTS, <http://www.uscourts.gov/FederalCourts/Bankruptcy/BankruptcyBasics/DischargeInBankruptcy.aspx> (“Typically, [a Chapter 7 discharge is granted] about four months after the date the debtor files the petition with the clerk of the bankruptcy court.”).

32. Strong proponents included the Chapter 13 trustees—whose trade group devoted an annual meeting to criticizing the Sullivan, Warren, and Westbrook finding—and several prominent bankruptcy judges and law professors.

33. Michael Bork & Susan D. Tuck, *Bankruptcy Statistical Trends: Chapter 13 Dispositions* 4 graph 1 (Admin. Office of the U.S. Courts, Working Paper No. 2, 1994) (studying termination data for Chapter 13 cases filed between 1980 and 1988 and reporting that 36% of Chapter 13 cases received a discharge).

34. See, e.g., Gordon Bermant & Ed Flynn, *Measuring Projected Performance in Chapter 13: Comparisons Across the States*, AM. BANKR. INST. J., July–Aug. 2000, at 22, 22 (“Completion rates [for Chapter 13 filings] hover nationally at about one-third of confirmed plans . . . .”); Henry E. Hildebrand III, *Administering Chapter 13—At What Price?*, AM. BANKR. INST. J., July–Aug. 1994, at 16, 16 (“The trustees estimated that the completion rate of chapter 13 cases averaged 32.89 percent. This is consistent with conventional wisdom that approximately two-thirds of chapter 13 cases fail to reach discharge.”); Scott F. Norberg & Andrew J. Velkey, *Debtor Discharge and Creditor Repayment in Chapter 13*, 39 CREIGHTON L. REV. 473, 505 (2006) (“The overall discharge rate for the debtors in the seven districts covered by the Project was exactly the oft-repeated statistic of one-third.”).

Chapter 13's usefulness.<sup>35</sup> Aside from the potential for greater creditor recovery in Chapter 13,<sup>36</sup> Chapter 13 devotees noted that debtors received an array of benefits from Chapter 13 other than discharge. They pointed out that Chapter 13, unlike Chapter 7, permitted a debtor to cure a default on a secured debt, such as a home at risk of foreclosure, even if state law did not permit reinstatement and deceleration of the debt.<sup>37</sup> They emphasized that this benefit did not require the completion of the repayment plan.<sup>38</sup> Defenders of Chapter 13 also argued that the temporary stay of foreclosure or repossession during the pendency of Chapter 13 helped debtors make plans for the future even if cases ended without a discharge and debtors lost their property.<sup>39</sup> Finally, some argued that debtors benefitted from the Chapter 13-imposed discipline of living on a trustee-supervised repayment plan with a strict budget.<sup>40</sup> This rehabilitation aspect, it was asserted, might improve debtors' financial prospects even if they dropped out of Chapter 13 because they had now learned self-restraint and financial-management strategies from trying to hold themselves to a repayment program.<sup>41</sup>

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35. See, e.g., Bermant, *supra* note 18, at 65 ("Arguments are made that completion is neither necessary nor sufficient for success.").

36. In part because of the high rate of dismissals and conversions, recovery by nonpriority unsecured creditors in Chapter 13 appears to be quite low. The 2007 Consumer Bankruptcy Project data (on file with author) show that only one in three Chapter 13 plans even proposed to make any payment to unsecured creditors. Data from the U.S. Trustee Program for fiscal year 2008 show that there was zero payout to unsecured creditors in 32% of all Chapter 13 filings. U.S. DEP'T OF JUSTICE, U.S. TR. PROGRAM, FY-2008 CHAPTER 13 TRUSTEE AUDITED ANNUAL REPORTS (June 28, 2010), [http://www.justice.gov/ust/eo/private\\_trustee/library/chapter13/docs/ch13ar08-AARpt.xls](http://www.justice.gov/ust/eo/private_trustee/library/chapter13/docs/ch13ar08-AARpt.xls).

37. See, e.g., CHARLES JORDAN TABB, *THE LAW OF BANKRUPTCY* 1202 (2d ed. 2009) ("Chapter 13 gives a debtor a chance to retain her house, car, and other property, even if the debtor currently is in default and facing foreclosure.").

38. See Teresa Sullivan, Elizabeth Warren & Jay Lawrence Westbrook, *Consumer Debtors Ten Years Later: A Financial Comparison of Consumer Bankrupts 1981–1991*, 68 AM. BANKR. L.J. 121, 143 (1994) ("Some judges and lawyers reacted to our 1981 findings by asserting, among other things, that success in chapter 13 is not properly measured merely by completion of a plan because many debtors get benefits from incomplete cases, including an opportunity to negotiate with mortgage holders and other creditors.").

39. See, e.g., Bermant, *supra* note 18, at 67 (noting that an alternate measure of success in Chapter 13 could include debtors retaining their collateralized property); see also Teresa A. Sullivan, Elizabeth Warren & Jay Lawrence Westbrook, *What We Really Said About Chapter Thirteen*, NACTT Q., Apr. 1992, at 18, 19 [hereinafter *What We Really Said*] ("The two-thirds statistic does not mean that these Chapter 13 [bankruptcies] were total failures—for example, foreclosure of a home may have been forestalled, or the petitioners might have learned more about household budgeting by developing a plan.").

40. Colloquium, *Panel Discussion: Consumer Bankruptcy*, 67 FORDHAM L. REV. 1315, 1356, 1358 (1999) (relating comments by a private practitioner that "there is nothing like having [a bankruptcy trustee] spend three-to-five years helping the debtor understand how . . . to budget," an education that one "cannot find . . . in a Chapter 7 case," and by a law professor that "one of the remarkable things . . . is that Chapter 13, even in those areas of the country without a formal education program, does by its nature provide some education").

41. See *What We Really Said*, *supra* note 39, at 19 ("The two-thirds statistic does not mean that these chapter 13 [sic] were total failures—for example, . . . the petitioners might have learned more about household budgeting by developing a plan."); cf. Siporin, *supra* note 18, at 53 ("There has



Adding punch to this alternate theory was the fact that Chapter 13 cases most commonly ended because the debtors stopped making their payments.<sup>42</sup> In other words, the debtors themselves were the “cause” of the failed cases.<sup>43</sup> In this view, the early exits from Chapter 13 were the outgrowth of providing consumers with more tools for relief. The alternate theory posited that the dropout rate for Chapter 13 was evidence that giving consumers choices allowed them to tailor their uses of the legal system to their individual needs and desires. The argument was plausible, at least in theory. Even Sullivan, Warren, and Westbrook backed down a bit, admitting in a later work that it was a “difficult issue . . . whether Chapter 13 ‘works’ for those petitioners who choose it.”<sup>44</sup>

The furious debate over Chapter 13 cooled to an intellectual stalemate. Chapter 13 critics did not give up, but neither did supporters. Eventually, the fervor died down for a lack of new arguments. In successive reforms, Congress added amendments to encourage—and then to force—a greater number of troubled debtors into Chapter 13.<sup>45</sup> Today, Chapter 13 is

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been little recognition that [Chapter XIII] actually constitutes a federal social service program. It provides individualized assistance to meet social needs and is so understood by a number of the debtors.”). Siporin offered as an illustration of the potential “disciplining” effect of repayment bankruptcy a situation in which being on a debt plan would help a debtor’s alcoholic husband assume his family responsibilities. *Id.*

42. Cf. 2010 BAPCPA REPORT, *supra* note 31, at 16–17, 63 tbl.6 (reporting that 49% of Chapter 13 cases nationwide, and up to 85% in some districts, were dismissed for failure to make plan payments).

43. For example, perhaps debtors simply could not respond to obvious economic incentives and were steering themselves into the wrong chapter. Cf. Michelle J. White, *Economic Versus Sociological Approaches to Legal Research: The Case of Bankruptcy*, 25 LAW & SOC’Y REV. 685, 691 (1991) (“Another implication of the economic theory of bankruptcy is that debtors will only choose chapter 13 when the terms of the repayment plan make them no worse off than they would be if they filed under chapter 7.”).

44. *What We Really Said*, *supra* note 39, at 19.

45. To be sure, the support of Chapter 13 in the decades after the Bankruptcy Code’s enactment in 1978 may have come from those who either clearly or latently supported pro-creditor positions, rather than those concerned with improving outcomes for debtors. The political-economy story of recent amendments to consumer bankruptcy law is that the consumer credit industry exerted more influence than debtor interests, resulting in the expansion and entrenchment of Chapter 13. See Stephen Nunez & Howard Rosenthal, *Bankruptcy “Reform” in Congress: Creditors, Committees, Ideology, and Floor Voting in the Legislative Process*, 20 J.L. ECON. & ORG. 527, 527–29, 553 (2004) (concluding that both ideology and money played a significant role in support for the legislation). Experts in consumer bankruptcy, including trustees, judges, and academics, do still play a role in law reform, and some experts profess strong support for Chapter 13 because they believe it provides better solutions for debtors in certain situations. See, e.g., *In re Wilks*, 123 B.R. 555, 562 (Bankr. W.D. Tex. 1991) (“Congress intended Chapter 13 to be the primary tool of wage earners to save their home.”); Jean Braucher, *Counseling Consumer Debtors to Make Their Own Informed Choices—A Question of Professional Responsibility*, 5 AM. BANKR. INST. L. REV. 165, 186 (1997) (noting that Chapter 13 is “often touted as a means to save a home” and commenting that when saving a home is not possible under Chapter 7, Chapter 13 may be more likely to succeed in that goal).

considered a bedrock of consumer bankruptcy, esteemed by many for its nuanced approach to debt relief.<sup>46</sup>

But the basic question of whether Chapter 13 dismissals constitute successful outcomes for the millions of debtors who have taken that path has never been tested empirically.<sup>47</sup> Decades after the enactment of the Bankruptcy Code, knowledge of outcomes of Chapter 13 can largely be reduced to one enduring fact: only one in three cases ends in a Chapter 13 discharge. There is simply no evidence of whether the remaining cases in which debtors do not complete repayment plans are successful in providing relief to debtors. The result is a gaping hole in the knowledge necessary to assess the efficacy of the bankruptcy system. This lack of data is particularly remarkable because dropping out is more common than completion and because that ratio of outcomes has persisted for more than thirty years.<sup>48</sup>

This Article exposes the real outcomes of Chapter 13 bankruptcy for the first time. It provides evidence of what problems families *tried* to solve in bankruptcy and what problems they *did* solve in bankruptcy. These data come from hour-long telephone interviews conducted as part of my original empirical study of 303 debtors from across the nation. Study participants failed to receive a Chapter 13 discharge, and a strong majority exited the bankruptcy system entirely (rather than converting to Chapter 7). My findings lay bare, against theories and conjecture, what really happens to families that file Chapter 13 bankruptcy.

The data show that participating families had two major goals in filing Chapter 13: to keep their homes,<sup>49</sup> and to reduce personal and family stress

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46. See, e.g., BARRY E. ADLER ET AL., CASES, PROBLEMS, AND MATERIALS ON BANKRUPTCY 25, 39, 517–20, 621 (4th ed. 2007) (arguing that while most individuals now choose Chapter 7, Chapter 13 is valuable because it allows a debtor to discharge claims not dischargeable under Chapter 7 and to circumvent recalcitrant creditors, and explaining that Chapter 13 empowers debtors to assume ownership in restructuring their obligations through the proposal of individualized repayment plans, which may allow them to retain otherwise nonexempt assets); DOUGLAS J. WHALEY & JEFFREY W. MORRIS, PROBLEMS AND MATERIALS ON DEBTOR AND CREDITOR LAW 253 (3d ed. 2006) (observing that many attorneys and judges extol the “wonders” of Chapter 13 relief and noting that Chapter 13 offers a number of benefits not available under Chapter 7, including the ability to retain possession of all property, avoid the need to pay off claims by way of full redemption in a Chapter 7 case, and obtain a stay in favor of co-debtors).

47. Even the most comprehensive study, the Chapter 13 Project, relies solely on the discharge rate as its measure of debtor success. See Norberg & Velkey, *supra* note 34, at 504 (explaining that the study relied solely on discharge and refiling rates because they are the only reliable measure of debtor success); see also Bork & Tuck, *supra* note 33, at 4 (“Data are not collected on why a chapter 13 case has been dismissed or at what stage of the life cycle the case is dismissed.”). To the extent research has gone beyond counting legal outcomes, it has focused primarily on attempting to predict what determines plan completion rather than examining real outcomes in noncompleted cases. See David A. Evans & Jean M. Lown, *Chapter 13 Bankruptcy: Successful Versus Unsuccessful Debtors*, 18 PAPERS W. FAM. ECON. ASS’N 33, 33 (2003) (“With the dismal track record of chapter 13, it is important to understand why plans fail (cases are dismissed) or how debtors who succeed in chapter 13 differ from debtors who fail to complete their plans.”).

48. See *supra* note 34 and accompanying text.

49. Among all debtors, saving a home was the most commonly identified “most important” goal of bankruptcy. About three-fourths (74%) of the debtors in the study were homeowners, and

by gaining control over their financial circumstances.<sup>50</sup> The data show that families temporarily accomplished these goals during the time they were in Chapter 13. Most kept their homes during bankruptcy. And with collection calls halted and repossessions held at bay, these families reported significantly reduced stress and less marital strain. For many, Chapter 13 may have seemed like divine relief.

But these families received only half answers to their prayers. Once their cases were dismissed, the relief quickly evaporated. Within a few weeks, 14% of homeowners had already lost their homes, and another 59% were in default and on the path to foreclosure. Similarly, the respite from collection calls and repossessions was temporary. In this study's sample, one-fourth (26.6%) of Chapter 13 cases converted to Chapter 7, which would discharge the debtors' unsecured debts. The remaining (74.4%) cases ended in dismissals. This meant families still owed the full amount of their debts plus interest that accrued during the time they were in Chapter 13.<sup>51</sup> As creditors and debt collection agencies learned that the bankruptcies were dismissed, collection efforts began again.<sup>52</sup> For the majority of families dismissed from Chapter 13, relief was only temporary. They spent money that they could ill afford in order to file bankruptcy, only to find themselves unable to accomplish even their most basic goals and without a better solution for their problems.<sup>53</sup>

We might expect these families to be angry and disappointed. For them, Chapter 13 was the law's most potent remedy—a huge step that signaled that they were taking action to protect themselves. Filing gave them a welcome respite from debt pressures, and it fostered the sense that they could recapture the lives they had known before financial problems overtook them. Their phones stopped ringing with creditor calls, and they could enjoy living in their homes without risk of foreclosure. When they could no longer sustain payments in Chapter 13, they held on to their illusions as they quietly exited the system. Fully 83% of families reported that filing bankruptcy was a “very good” or “somewhat good” decision, despite its failure to produce any lasting solution. Some clung to the belief that “something would work out,”

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70% of these homeowners said that keeping their homes was their single most important goal in bankruptcy.

50. Nearly all families (99%) interviewed said it was a very important or somewhat important goal for bankruptcy to help them organize and get control of their financial situation; 86% said it was very important or somewhat important to stop harassment from creditors by filing bankruptcy.

51. *See* 11 U.S.C. § 1328 (2006) (providing that discharge is only available upon completion of the plan, with limited exceptions).

52. In the first weeks after their cases were dismissed, 40% of families had already received one or more collection calls.

53. A minority of households, approximately 20%, reported positive outcomes despite having dismissed or converted their cases. Subpart IV(C) of this Article, and particularly Figure 7 therein, describes these data. Fewer than one in five households (19%) agreed that their bankruptcies ended because they had found better solutions. Just over one in four (27%) agreed that their bankruptcies ended because they had accomplished their bankruptcy goals.

while others acknowledged that they had run out of options. Some blamed themselves, saying they had failed the system, and others blamed individual actors such as their attorneys or the trustees in their cases. But very few questioned whether the Chapter 13 system was itself fatally designed and only infrequently capable of solving their financial problems.

Policy makers follow a similar path. We might expect the benevolent policy makers who designed the bankruptcy system to be protesting loudly and pressing hard for changes in the bankruptcy laws to improve alternatives for families mired in debt. Instead, both debtors and policy makers continue to embrace Chapter 13.<sup>54</sup> Despite the evidence of high dismissal rates, the policy debate largely accepts the alternate theory—that incomplete Chapter 13 cases produce solutions on par with completed cases.<sup>55</sup> Others blame any problems with Chapter 13 on bad lawyers, inattentive trustees, or ill-informed judges.<sup>56</sup>

Chapter 13 is a pretend solution. I use this term to mean a social program that does not work as intended but is not critiqued or reformed because its flaws are hidden. The consumer bankruptcy system fits this description, as the data show. While this study's findings are new, the systemic failure of Chapter 13 has existed for decades. The data in this Article are a clarion call to redesign bankruptcy relief to be simpler and blunter, even if the resulting system of rough justice leaves a few sophisticated or lucky people with fewer legal options. The tyranny of choice in consumer law is that the complexity is so expensive and difficult to navigate that most people do not receive any relief, and policy makers never have to confront those poor outcomes.

Chapter 13 also is a cautionary tale about what happens when policy makers—with the best of intentions—offer up a program to help consumers

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54. See Ed Flynn & Phil Crewson, *Data Show Trends in Post-BAPCPA Filings*, AM. BANKR. INST. J., July–Aug. 2008, at 14, 14 (noting that during the first twelve months after passage of the Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA), Chapter 13 cases rose from 29% of all bankruptcy filings to 42%); Angela Littwin, *The Affordability Paradox: How Consumer Bankruptcy's Greatest Weakness May Account for its Surprising Success*, 52 WM. & MARY L. REV. 1933, 1953 (2011) (identifying ways in which BAPCPA was designed to push debtors toward Chapter 13 by raising procedural barriers to Chapter 7 and structuring incentives for bankruptcy attorneys to advise their clients to choose Chapter 13).

55. Cf. Bermant, *supra* note 18, at 65 (noting that, for some judges, trustees, attorneys, debtors, and secured creditors, completion is not necessary for success); Norberg & Velkey, *supra* note 34, at 504 (observing that some bankruptcy trustees do not consider noncompletion to be equivalent to failure and that in some cases the debtor merely needs the brief protection of Chapter 13 to regain financial footing).

56. See Scott F. Norberg, *Consumer Bankruptcy's New Clothes: An Empirical Study of Discharge and Debt Collection in Chapter 13*, 7 AM. BANKR. INST. L. REV. 415, 440, 450 (1999) (suggesting that judges, trustees, creditors, and debtors' attorneys could reduce dismissed cases if they had data on factors that correlate with case dismissal, but ultimately finding no data that are useful predictors of case outcome); Bork & Tuck, *supra* note 33, at 6–8 (noting that the likelihood of a discharge or dismissal depends on the expertise and attentiveness of judges, trustees, and lawyers, which varies by district).

but fail to adequately monitor outcomes. The program's mere existence immunizes policy makers from the need to assess whether the program is an effective solution. In bankruptcy, Congress can push more debtors into Chapter 13, confident that its supporters will defend the move as a benevolent act rather than a callous way to leave debtors at the mercy of their creditors. New efforts to point out continued suffering from overwhelming debts may be met with a wagging finger and a reminder that a good solution already exists, and if problems persist, perhaps it is the moral fiber of these troubled families that is the real problem. Because experts can show that the legal tools work in hypothetical cases, any failures in real cases are the fault of the debtors themselves, not the design of the system.

The result is an unholy contract between the helpers (policy makers) and the helped (bankruptcy debtors). Neither side has succeeded, yet both are lulled into inaction. The pretend solution is powerful because it does meaningful work for both parties. Pretend solutions entrench the status quo and discourage efforts to argue that laws need to be improved. Families content themselves with false hope, and policy makers content themselves with false promises.

Pretend solutions are not unique to bankruptcy. A number of problems may be declared solved, while in fact, the social policies are failing. The data reported in this Article suggest ways to frame a theory of pretend solutions. Complexity, for example, facilitates the repeated redefining of the purpose of a law, so that every twist and turn in the law creates the opportunity for the adoption of a new theory of success. Similarly, expert participation in crafting a solution creates a powerful assumption from the outset that the program cannot be improved—and therefore does not need monitoring and assessment. Not every program with some of the features of a pretend solution is a failure. But these features, often viewed as markers of a generous and effective social program, can signal that the legal solution to a problem may be a mirage.

This Article also illustrates the cure for pretend solutions. Empirical research can expose pretend solutions or, if conducted early enough, prevent recently established programs from becoming pretend solutions. For example, the federal government's Home Affordable Modification Program (HAMP) was rolled out with an identified goal of helping three to four million homeowners stay in their homes.<sup>57</sup> While there were no plans to report on whether that goal had been accomplished, the program was part of the

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57. See President Barack Obama, Address at Dobson High School, Mesa, Arizona: Remarks by the President on the Home Mortgage Crisis (Feb. 18, 2009), *available at* <http://www.whitehouse.gov/the-press-office/remarks-president-mortgage-crisis> (proclaiming that the housing plan "will enable as many as 3 to 4 million homeowners to modify the terms of their mortgages to avoid foreclosure"); Press Release, U.S. Dep't of the Treasury, Homeowner Affordability and Stability Plan Fact Sheet (Feb. 18, 2009), *available at* <http://www.treasury.gov/press-center/press-releases/Pages/20092181117388144.aspx> (reiterating that the plan would "offer reduced monthly payments for up to 3 to 4 million at-risk homeowners").

Troubled Asset Relief Program (TARP) and therefore fell under the jurisdiction of the Congressional Oversight Panel.<sup>58</sup> The Panel, led by Elizabeth Warren, insisted on regular data reporting—and it cross-examined those data and reported them in accessible language.<sup>59</sup> The conclusion was inescapable: HAMP was a dismal failure.<sup>60</sup> Despite the Obama Administration's efforts to redefine the goal of HAMP to claim success, the data and public reporting made clear that HAMP “failed to provide meaningful relief to distressed homeowners and, disappointingly, [that] the Administration inadvertently created a sense of false expectations among millions of homeowners who reasonably anticipated that they would have the opportunity to modify or refinance their troubled mortgage loans under HAMP.”<sup>61</sup> This empirical analysis of outcomes revealed HAMP as a masquerade and prevented it from becoming a pretend solution.<sup>62</sup> Because the failure of the existing program was obvious, policy makers must again confront the problem of unaffordable mortgages.

The differences between HAMP (which was recognized as a nonsolution) and Chapter 13 bankruptcy (which has existed for decades as a pretend solution) suggest factors to consider in designing a legal solution to a social problem. Clever, or even generous, front-end statutory solutions do not guarantee the desired outcomes. Successful solutions require the establishment of objectives for the law and the simultaneous design of back-end program evaluations. Without these checks, the law can continue to systemically underperform its objectives.

The way to avoid pretend solutions is to focus sharply on outcomes, not intentions. At the outset, policy makers should identify simple outcomes and

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58. See 12 U.S.C. § 5233(b)(1)(A)(iv) (Supp. III 2009) (assigning to the Congressional Oversight Panel the duty of issuing regular reports on “the effectiveness of foreclosure mitigation efforts”); CONG. OVERSIGHT PANEL, OCTOBER OVERSIGHT REPORT: AN ASSESSMENT OF FORECLOSURE MITIGATION EFFORTS AFTER SIX MONTHS 43 (2009) [hereinafter OCTOBER OVERSIGHT REPORT] (stating that HAMP is funded by a government commitment comprised of funds from both TARP and the Housing and Economic Recovery Act).

59. See OCTOBER OVERSIGHT REPORT, *supra* note 58, at 34–35 (detailing the Treasury Department's data collection and reporting efforts and encouraging the Treasury to improve them).

60. See CONG. OVERSIGHT PANEL, APRIL OVERSIGHT REPORT: EVALUATING PROGRESS ON TARP FORECLOSURE MITIGATION PROGRAMS 5 (2010) (“The redefaults signal the worst form of failure of the HAMP program: billions of taxpayer dollars will have been spent to delay rather than prevent foreclosures.”); see also CONG. OVERSIGHT PANEL, DECEMBER OVERSIGHT REPORT: A REVIEW OF TREASURY'S FORECLOSURE PREVENTION PROGRAMS 46 (2010) [hereinafter DECEMBER OVERSIGHT REPORT] (reporting that HAMP had achieved only 483,342 active permanent modifications and calculating that since HAMP began, there have been just over nine foreclosure starts for every one HAMP modification).

61. DECEMBER OVERSIGHT REPORT, *supra* note 60, at 124.

62. See OCTOBER OVERSIGHT REPORT, *supra* note 58, at 136–40 (presenting the dissent of Congressman Jeb Hensarling, who nonetheless acknowledged that “[a] fair reading of the Panel's majority report and my dissent leads to one conclusion—HAMP and the Administration's other foreclosure mitigation efforts to date have been a failure”); see also 157 CONG. REC. H1994 (daily ed. Mar. 29, 2011) (introducing the HAMP Termination Act of 2011, which sought to “put an end to the poster child for failed Federal foreclosure programs”).

design ways to measure whether those ends are being achieved. The resulting data will break the satisfying illusion of success and drive better social programs.

## II. A Primer on Chapter 13 Bankruptcy Law

Today, nearly all consumers who file bankruptcy still have the option of choosing between Chapter 7 and Chapter 13.<sup>63</sup> Chapter 7 is more popular, accounting for about two-thirds of consumer filings in recent years.<sup>64</sup> In Chapter 7, a debtor receives an immediate discharge of his unsecured debts in exchange for turning over all nonexempt assets for distribution to his creditors. Because of relatively generous exemption levels, about 96% of consumer Chapter 7 cases are “no-asset” distributions,<sup>65</sup> and debtors receive a discharge of their unsecured debts about four months after filing bankruptcy.<sup>66</sup>

Chapter 13 attracts about one in three bankrupt households.<sup>67</sup> Only individuals or families (not entities or businesses) with debts below statutory thresholds may file Chapter 13.<sup>68</sup> Eligibility also depends on the debtor

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63. The “means test” incorporated into the Bankruptcy Code in 2005 does screen Chapter 7 cases for presumed “abuse,” and if the debtor cannot rebut the presumption of abuse, the case is dismissed or the debtor must convert to Chapter 13. 11 U.S.C. § 707(b) (2006). It appears that only a small number of people who have chosen to file bankruptcy since the 2005 law was implemented have been truly “forced” into Chapter 13. About one-half of one percent of all Chapter 7 debtors are forced to convert to Chapter 13 after failing the means test and then losing litigation to rebut the means-test presumption that their Chapter 7 case is an abuse of the system. See Katie Porter, *Means Test Changes Won't Mean Much*, CREDIT SLIPS (Oct. 26, 2009, 5:34 AM), <http://www.creditslips.org/creditslips/2009/10/means-test-changes-wont-mean-much.html> (citing U.S. DEP'T OF JUSTICE, U.S. TR. PROGRAM, ANNUAL REPORT: FISCAL YEAR 2008, available at [http://www.justice.gov/ust/eo/public\\_affairs/annualreport/docs/ar2008.pdf](http://www.justice.gov/ust/eo/public_affairs/annualreport/docs/ar2008.pdf)) (concluding that trustees filed motions to dismiss for abuse in only 0.4% of Chapter 7 cases in 2008). The means test may operate primarily as a sorting mechanism to screen people into Chapter 7 or Chapter 13 before filing or to discourage any bankruptcy filing. The initial empirical evidence, however, suggests that the inflation-adjusted median income of Chapter 7 and Chapter 13 filers did not change between 2001 and 2007, which is consistent with the idea that the means test did not dramatically influence either the bankrupt population or the selection between Chapter 7 and Chapter 13. Robert M. Lawless, Angela K. Littwin, Katherine M. Porter, John A.E. Pottow, Deborah K. Thorne & Elizabeth Warren, *Did Bankruptcy Reform Fail? An Empirical Study of Consumer Debtors*, 82 AM. BANKR. L.J. 349, 361–63 & fig.3 (2008).

64. Katie Porter, *Today's Consumers Prefer Chapter 7 Bankruptcy 3 to 1*, CREDIT SLIPS (Mar. 22, 2010, 6:08 PM), <http://www.creditslips.org/creditslips/2010/03/todays-consumers-prefer-chapter-7-bankruptcy-3-to-1.html> (noting that the rate of Chapter 13 filings was 38% in 2006–2007, 31% in 2008, and 26.5% in 2009).

65. Ed Flynn et al., *Chapter 7 Asset Cases*, AM. BANKR. INST. J., Dec.–Jan. 2003, at 22, 22.

66. See *supra* note 31 and accompanying text.

67. See *supra* note 64 and accompanying text.

68. 11 U.S.C. § 109(e) (2006). As of the date of the bankruptcy petition, a Chapter 13 debtor must have noncontingent, liquidated, unsecured debts of less than \$360,475 and noncontingent, liquidated, secured debts of less than \$1,081,400. *Chapter 13: Individual Debt Adjustment*, ADMIN. OFF. U.S. COURTS, <http://www.uscourts.gov/bankruptcycourts/bankruptcybasics/Chapter13.aspx>.

having “regular” income,<sup>69</sup> although that income could be from nonwage sources such as government benefits or family support.<sup>70</sup>

Chapter 13 permits debtors to retain all assets, regardless of whether the assets are exempt under law.<sup>71</sup> In return, debtors pay their “disposable income” to their unsecured creditors and make payments on their secured obligations.<sup>72</sup> The repayment period is between three and five years.<sup>73</sup> The bankruptcy court must confirm the repayment plan for it to take effect.<sup>74</sup> The terms of repayment are complex, reflecting an interaction of legal requirements and negotiations with creditors.<sup>75</sup> Generally, Chapter 13 debtors are required to live on modest budgets, which are reviewed by courts and bankruptcy trustees at the time of plan confirmation.<sup>76</sup>

Chapter 13 debtors can retain assets secured by collateral (homes, cars, boats, etc.) only if they can continue to make the ongoing payments on those debts during the repayment plans.<sup>77</sup> For most collateral other than the debtor’s principal residence, Chapter 13 permits a debtor to restructure the terms of secured debts, typically by writing down the obligation to the value of the collateral.<sup>78</sup> Home-mortgage debt may not be modified;<sup>79</sup> this is the “cramdown” prohibition.<sup>80</sup> However, Chapter 13 is widely used by

69. 11 U.S.C. § 109(e).

70. *See, e.g., In re Antoine*, 208 B.R. 17, 20 (Bankr. E.D.N.Y. 1997) (finding that spousal support can be a source of regular income for purposes of 11 U.S.C. § 109(e)); *In re Dawson*, 13 B.R. 107, 109 (Bankr. M.D. Ala. 1981) (noting that “persons who receive . . . various government-provided benefits qualify as individuals with regular income”).

71. 11 U.S.C. § 1327(b)–(c).

72. *Id.* § 1325(b)(1)(B); *see also id.* § 1307(c)(6) (allowing dismissal or conversion of the case if the debtor fails to make payments).

73. *See id.* § 1322(d) (stating that plans may be three to five years, depending on circumstances, but prohibiting courts from approving periods longer than five years in any case). It appears that the majority of Chapter 13 debtors propose plans of five years in length. *See* Scott F. Norberg & Nadja Schreiber Compo, *Report on an Empirical Study of District Variations, and the Roles of Judges, Trustees and Debtors’ Attorneys in Chapter 13 Bankruptcy Cases*, 81 AM. BANKR. L.J. 431, 453–55 & tbls.13 & 14 (2007) (reporting that median and modal plan length was 60 months for a sample of Chapter 13 cases filed in 1994 in seven judicial districts).

74. 11 U.S.C. § 1327(a).

75. *See id.* § 1322(a)–(b) (listing both the minimum mandatory requirements a repayment plan must contain and the terms a debtor may include in his repayment plan).

76. *See id.* § 1325(b)(1) (prohibiting confirmation of a plan unless it either pays objecting creditors in full or distributes all of the debtor’s “projected disposable income” as determined by the court).

77. *See id.* § 1307(c)(6) (allowing a creditor to force the liquidation of a debtor’s property if the debtor stops making payments as required under the repayment plan).

78. *See id.* § 1322(b)(2) (allowing modification of a secured creditor’s rights); *id.* § 1325(a)(5)(B)(ii) (allowing confirmation of a plan that pays out only the allowed amount of a secured claim); *id.* § 506(a)(1) (restricting the allowed amount of a secured claim to the value of the collateral).

79. *Id.* § 1322(b)(2).

80. *See supra* note 15 and accompanying text; *see also* William Safire, *Cramdown*, N.Y. TIMES, Jan. 22, 2009, available at <http://www.nytimes.com/2009/01/25/magazine/25wwln-safire-t.html> (describing *cramdown* as a “vivid noun [that] has long enlivened the language of bankruptcy law”).



homeowners facing foreclosure and has an explicit home-saving purpose.<sup>81</sup> Debtors are permitted to cure missed mortgage payments in their repayment plans, with foreclosure stayed as long as a debtor makes all ongoing payments as required by his mortgage loan while also catching up on all missed payments as set forth in his repayment plan.<sup>82</sup>

A Chapter 13 trustee administers the case.<sup>83</sup> The trustee collects payments from the debtor and makes distributions to creditors.<sup>84</sup> At the end of the repayment plan, the debtor receives a discharge of any remaining amount of unsecured debt.<sup>85</sup> The discharge does not affect liens on property, so if a debtor fails to make payments after bankruptcy on secured obligations such as home and car loans, he can lose that property.<sup>86</sup> However, the discharge prevents the creditor from suing the debtor for any deficiency outstanding after the collateral is sold and the proceeds applied to the debt.<sup>87</sup> The discharge basically functions as an injunction that protects the debtor from personal liability for any discharged obligations. The primary exceptions to discharge are domestic support and educational obligations, which are not dischargeable in either Chapter 7 or Chapter 13.<sup>88</sup>

Chapter 13 is expensive. Attorneys charge two to three times more to file a Chapter 13 case than to file a Chapter 7 case. In 2007, the median attorney's fees for Chapter 13 were \$2,500, in comparison with \$1,000 for Chapter 7.<sup>89</sup> To put these costs in context, consider Chapter 13 debtors' incomes at the time of bankruptcy. In 2007, the median Chapter 13 debtor had monthly income at the time of filing of \$3,058.<sup>90</sup> To pay attorney's fees in a lump-sum payment at the time of filing, as is required to file Chapter 7 bankruptcy, families may have to save up for many months.<sup>91</sup> Chapter 13 permits debtors to pay their attorney's fees as part of their repayment plans.<sup>92</sup> Most attorneys require a modest down payment of a few hundred dollars at

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81. *See infra* section IV(A)(1).

82. 11 U.S.C. § 1322(b)(3), (b)(5), (c).

83. *Id.* § 1302(a)–(b).

84. *Id.* §§ 704(a)(1), 1302(b).

85. *Id.* § 1328.

86. *See id.* § 1328(a)(1) (exempting from discharge secured or unsecured debts when the last payment is after the end of the plan); *id.* § 1322(b)(5) (permitting the trustee to arrange plans for payment of secured and unsecured debt).

87. *See id.* § 1328(a) (discharging debts except for those enumerated); *id.* § 506(a) (bifurcating the secured debt into an allowed secured claim that is still secured by the lien and an allowed unsecured claim subject to the discharge).

88. *Id.* §§ 101(14A), 523(a)(5), 523(a)(8), 1328(a)(2).

89. *See supra* note 29.

90. Author's calculations from the 2007 Consumer Bankruptcy Project (on file with author).

91. Ronald J. Mann & Katherine Porter, *Saving Up for Bankruptcy*, 98 GEO. L.J. 289, 292, 319, 323 (2010).

92. HENRY J. SOMMER ET AL., NAT'L CONSUMER LAW CTR., 1 CONSUMER BANKRUPTCY LAW AND PRACTICE § 16.4 (9th ed. 2009); *see also* 11 U.S.C. § 1322(a)(2) (requiring Chapter 13 plans to provide full payment of priority claims); *id.* §§ 503(b)(4), 507(a)(2) (granting priority to "administrative expenses" such as attorney's fees).

the time that the petition is filed and receive the remaining fees in the first few payments under the repayment plan.<sup>93</sup> There are no estimates of how many people are driven to Chapter 13 by the ability to finance attorney's fees.

When enacted in 1978, Chapter 13 offered "carrots" to incentivize the choice of repayment.<sup>94</sup> Reforms have reduced many of those benefits, including a broader discharge for debts in Chapter 13 than in Chapter 7.<sup>95</sup> Today, the "stick" of a means test labeling debtors as abusers of the Chapter 7 system<sup>96</sup> will push a small fraction of debtors to file Chapter 13. But the vast majority of families choose Chapter 13 voluntarily.<sup>97</sup> There is little systematic research on why families file Chapter 13 instead of Chapter 7. In the study reported in this Article, only about half (47%) of all debtors even considered Chapter 7. Those debtors were asked why they chose Chapter 13. The most popular answers were wanting to keep assets such as homes or cars, attorney advice that Chapter 13 was better for their situation, and wanting to try to repay their debts.

Despite successive reforms that have made Chapter 13 less generous to debtors, the percentage of Chapter 13 filings has barely budged from its one-third share of bankruptcies filed.<sup>98</sup> In 2010, over 400,000 households filed Chapter 13 cases.<sup>99</sup> Chapter 13 is a centerpiece of the American bankruptcy system, emblematic of the focus on consumer choice and sophisticated legal tools that carefully balance the rights of debtors and creditors.

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93. See SOMMER, *supra* note 92, at § 16.4.1 (positing that an attorney's assurance that his or her fee will be paid through the plan makes him or her more comfortable about taking the client's case with only a modest down payment rather than a large advance payment of all or most of the fee).

94. See ELIZABETH WARREN & JAY LAWRENCE WESTBROOK, *THE LAW OF DEBTORS AND CREDITORS* 346 (6th ed. 2009) ("Congress attempted to influence debtors to choose Chapter 13 by offering carrots, such as a broader discharge and the ability to deal with secured creditors over time.").

95. See Thomas Evans & Paul B. Lewis, *An Empirical Economic Analysis of the 2005 Bankruptcy Reforms*, 24 EMORY BANKR. DEV. J. 327, 338–39 (2008) (describing the reduced number of items included in Chapter 13's "super-discharge" after the amendment of the Bankruptcy Code).

96. See *supra* note 63.

97. See WARREN & WESTBROOK, *supra* note 94, at 347 (observing that "almost 90 percent of those who now file in Chapter 13 are below-median debtors who could have filed in Chapter 7 despite the means test").

98. See *supra* note 24 and accompanying text.

99. ADMIN. OFFICE OF THE U.S. COURTS, U.S. BANKRUPTCY COURTS—BUSINESS AND NONBUSINESS CASES COMMENCED, BY CHAPTER OF THE BANKRUPTCY CODE, DURING THE 12-MONTH PERIOD ENDING DECEMBER 31, 2010, available at [http://www.uscourts.gov/uscourts/Statistics/BankruptcyStatistics/BankruptcyFilings/2010/1210\\_f2.pdf](http://www.uscourts.gov/uscourts/Statistics/BankruptcyStatistics/BankruptcyFilings/2010/1210_f2.pdf).

### III. Methodology of the Chapter 13 Dropout Study

#### A. *Study Design*

The purpose of this study is to provide a systematic examination of what actually happens to the households whose Chapter 13 cases do not end in plan completion and a Chapter 13 discharge. Such data are not available from public court records. As a matter of practice, almost all dismissed cases are officially terminated by a trustee's motion to dismiss the case, most commonly because the debtor quit making payments.<sup>100</sup> This is because debtors' attorneys generally do not go to the expense and hassle of filing motions to dismiss cases. Instead, the attorneys instruct the debtors to simply stop paying and let the trustee dismiss the case. For this reason, the procedural outcome of trustee dismissal reveals almost nothing about the reasons for the outcome of a case. To see why, imagine two situations that could result in a dismissed Chapter 13 case. In the first situation, the debtor confirmed a repayment plan but lost her job. She stops paying the trustee because she cannot afford to complete her repayment plan. She will exit bankruptcy still delinquent on all her debts. In the second situation, the debtor confirmed a repayment plan. She then made eighteen consecutive plan payments, paying off all the arrearages on her mortgage and becoming current on the loan. This debtor received a raise recently and thinks she can manage to pay off her modest unsecured debts on ordinary nonbankruptcy terms. She stops paying the trustee because her attorney told her this would end her bankruptcy, which she no longer sees herself as needing. Both debtors will exit the Chapter 13 system with a case disposition of "dismissed for failure to make plan payments." However, these debtors have very different outcomes from bankruptcy if measured in terms of their future economic prospects and relief from prior debts. The publicly available court-record data mask these differences and do not permit a researcher to disprove the alternate theory of Chapter 13.

To see the real outcomes from bankruptcy, I conducted a study of 303 debtors who did not receive a discharge. In the remainder of this Article, I refer to the study as the "Chapter 13 Dropout Study." The cases included in the study ended in either dismissal or conversion; they share the fact that the debtors "dropped out" of Chapter 13. Shortly after their cases ended, debtors were interviewed about their goals for bankruptcy and whether they achieved these goals. The resulting data reveal why Chapter 13 bankruptcy cases end—not merely in legal terms (i.e., the debtor stopped paying the trustee), but also in terms of life events. In the subparts below, I provide more details on the survey's techniques and sample. Before turning to those issues, I briefly describe the key research questions of the survey interview.

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100. See *supra* note 42 and accompanying text.

The main goal of the interview was to measure whether dismissed or converted Chapter 13 cases are successes or failures from debtors' perspectives.<sup>101</sup> The first part of the interview asked debtors what goals they wanted to accomplish in bankruptcy. Debtors were asked how important it was to them to accomplish each specific named goal. This was repeated for more than a dozen goals that were likely reasons the debtors chose to file bankruptcy generally and Chapter 13 in particular. Debtors were also asked if they had any other goals and to identify their single most important goal from a list of all self-identified "very important" goals. Additional questions were asked about saving property, particularly preventing a home foreclosure, because prior research has established that 75% of Chapter 13 debtors are homeowners and that nearly all of these homeowner debtors are delinquent on their home mortgages at the time of filing.<sup>102</sup> The questions regarding bankruptcy goals permit me to move beyond the mere legal end result of a nondischarge case disposition and instead consider a more nuanced set of outcomes from bankruptcy.<sup>103</sup>

The second part of the interview then asked debtors about whether they achieved their bankruptcy goals. Various measures were used to probe overall outcomes and goal-specific outcomes from the Chapter 13 bankruptcies. Some questions sought debtors' subjective responses on the degree to which they felt they had accomplished their overall goals or their single most important goal in bankruptcy. Other questions were objective. For example, debtors were asked if they still owned their homes, and if not, why they no longer had their homes. They were also asked if they were current on their home mortgages or facing foreclosure. Other measures of outcome included questions about debtors' financial situations at the time of the interview (which usually occurred about two months after case termination) and questions about whether they thought filing bankruptcy was a good decision. In addition to financial characteristics, the interview queried debtors about aspects of psychological and social well-being—such as self-perceptions of stress and spousal relations—before, during, and after bankruptcy. These are crucial nonfinancial benefits of bankruptcy; prior

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101. These nondischarge-terminated bankruptcy cases could have resulted in greater payouts to creditors than if the debtor either had filed Chapter 7 or had not filed bankruptcy at all. Creditor recovery is uncontroversially an aspect of the design of the American bankruptcy system. But the fresh start for debtors—embodied by the discharge—is the heart of the Bankruptcy Code, and this is a debtor-centric goal. See generally Katherine Porter & Deborah Thorne, *The Failure of Bankruptcy's Fresh Start*, 92 CORNELL L. REV. 67 (2006) (describing the primacy of the fresh start in the consumer bankruptcy system).

102. Katherine Porter, *Misbehavior and Mistake in Bankruptcy Mortgage Claims*, 87 TEXAS L. REV. 121, 141 nn.125 & 127 (2008).

103. Cf. Daphna Lewinsohn-Zamir, *Beyond the Bottom Line: The Complexity of Outcome Assessment* 6–11 (Sept. 27, 2009) (unpublished manuscript), available at <http://ssrn.com/abstract=1479051> (describing differences between end results and outcomes). In the bankruptcy context, the end result is a dismissed case. But as Lewinsohn-Zamir notes, "Individuals regard various factors, in addition to end-results, as part of the ensuing outcome itself." *Id.* at 4.

research suggests that collection calls and “dunning letters” are a primary reason that consumers decide that they should seek bankruptcy relief.<sup>104</sup> Collectively, the interview questions were designed to permit an evaluation of whether a debtor can be fairly characterized as having achieved a meaningful fresh start despite not receiving a discharge.

The interview did not assume that bankruptcy was the only or best solution to these families’ financial problems. The interview asked debtors why they had stopped paying their trustees and whether this was due to financial hardship such as a decline in income. Debtors were also asked whether their cases had ended because they found alternative solutions that they preferred to bankruptcy (such as negotiating outside of bankruptcy with a creditor, committing to a debt-management plan, etc.). Because these processes do not require the participation of a lawyer or court and occur outside the insular judicial process of bankruptcy, they are much harder to observe.

### B. Sampling Frame

This project documents the outcomes of debtors who exit the system. It is not an effort to predict completion of Chapter 13. The relevant sample, therefore, selected debtors whose Chapter 13 cases had ended, instead of all debtors who had filed Chapter 13 cases.<sup>105</sup> In limiting the sample to noncompleted cases, I make the assumption that the one-third of all Chapter 13 cases that end in discharge are “successes.”<sup>106</sup>

To obtain a sample of debtors whose Chapter 13 cases were terminated without discharge, I worked with a data service, AACER, which gathers data from all bankruptcy court files in the nation.<sup>107</sup> AACER provided me with a complete list of all Chapter 13 cases in the United States that ended without a discharge for a given time period.<sup>108</sup> Eligible cases included those that were dismissed (regardless of whether by debtor’s motion, trustee’s motion, etc.) or converted to Chapter 7.<sup>109</sup> For any given time period, AACER’s list was the universe of Chapter 13 cases that ended without a Chapter 13 discharge.

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104. See Mann & Porter, *supra* note 91, at 327–28 (suggesting that “in practice it is the ‘dunning’ stage of collection that is important in the etiology of bankruptcy filings”).

105. The 2007 Consumer Bankruptcy Project sample is appropriate for a study attempting to predict plan completion because it contains approximately 600 Chapter 13 cases filed in 2007. The final result of those cases can be determined by checking the court records in 2012, five years after the cases were filed.

106. For additional discussion of how data from the Chapter 13 Dropout Study can be combined with the one-third discharge rate for an overall assessment of the Chapter 13 system, see *infra* Part V, and subpart V(A) in particular.

107. AACER is an acronym for Automated Access to Court Electronic Records and is part of Epiq Systems, a company that provides data from bankruptcy court records. AACER also provided the lists for the 2007 Consumer Bankruptcy Project and is affiliated with the Harvard Bankruptcy Data Project, with which I am a fellow. I thank Mike Bickford, Anna Biggs, and other AACER staff for their assistance.

108. Cases from Puerto Rico were excluded from the sample.

109. Cases that converted to Chapter 11 or 12 were excluded from the sample.

Because AACER conducts daily monitoring of all bankruptcy cases in the nation, it can generate lists of “fresh” cases that were just terminated. However, the terminated cases themselves may have been filed anytime during the preceding five-year period. This is because cases have different longevities. Some cases terminate shortly after being filed, and others may not convert or dismiss until near the end of their repayment plan. Prior research found that the typical case that does not end in discharge terminates within two years of being filed.<sup>110</sup> The majority of cases were filed in the latter half of 2008 or during 2009. However, the sampling procedure gave all cases that terminated before plan completion an equal chance of being in the sample, regardless of the duration of time between filing and termination.

This sampling strategy is a new and innovative approach to studying outcomes in Chapter 13. Prior studies have interviewed an entire sample at the same moment in time (e.g., one year after the bankruptcy cases were filed).<sup>111</sup> The result of such an approach is that debtors are all at different points in their cases—some still trying to confirm a repayment plan, some having dropped out of bankruptcy without a discharge, some making payments under a plan, etc.—when the data are gathered. Unless such a study is conducted five years after all cases have been filed, the sample will not be representative of the full panoply of case outcomes. Sampling from recently terminated cases allowed me to interview debtors within a few weeks of their cases ending. This reduced problems in memory distortion from interviewing people about events that occurred in the past. It also likely boosted the response rate and reduced the number of people whose contact information in the bankruptcy court records was not valid. Virtually all debtors who participated in this study were interviewed within two months of the termination of their cases.

There remained some variation, however, among cases in how much time elapsed between when a debtor quit paying the bankruptcy trustee and when the case was terminated. Figure 1 is a histogram of how many months elapsed between when debtors last paid the bankruptcy trustee and the time of the interview. Over half of debtors were interviewed within three months of stopping payments, and 86% were interviewed within six months of stopping payments. The modest observed variation is largely a result of “local legal culture,” a longstanding feature of the consumer bankruptcy system.<sup>112</sup> Some trustees are more aggressive in dismissing a case after a

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110. See Norberg & Velkey, *supra* note 34, at 529 (reporting that cases that were dismissed or converted after plan confirmation lasted, on average, less than two years, whereas cases that were dismissed or converted before plan confirmation lasted, on average, less than six months).

111. The 2001 Consumer Bankruptcy Project used this strategy. See ELIZABETH WARREN & AMELIA WARREN TYAGI, *THE TWO-INCOME TRAP* 182 app. (2003) (detailing the sample and data collection procedures of the 2001 Consumer Bankruptcy Project).

112. See Jean Braucher, *Lawyers and Consumer Bankruptcy: One Code, Many Cultures*, 67 AM. BANKR. L.J. 501, 556–61 (1993) (describing how lawyers’ desire to fit in to the legal culture in different cities drives differences in bankruptcy practice); Teresa A. Sullivan, Elizabeth Warren &

missed payment, while others give debtors a grace period of three or so months in which they may catch up on their missed payments. Additionally, some debtors responded more quickly to the invitation to participate in the study than other debtors.

I obtained six lists of terminated Chapter 13 cases from AACER. The first list was treated as a pretest of survey procedures and consisted of a random sample of one hundred cases, from which seventeen interviews were completed. The remaining five lists make up the study sample. The lists each contained a single week of terminated cases from across the nation. While I could not identify any literature on seasonal variation in case termination,<sup>113</sup> I spread the draws of samples over several months. The lists were drawn for a given week from February, March, April, June, and August in 2010. This choice also permitted me to manage the scale of data collection with only a single research team member conducting the vast majority of interviews, eliminating the problem of intercoder reliability.<sup>114</sup>

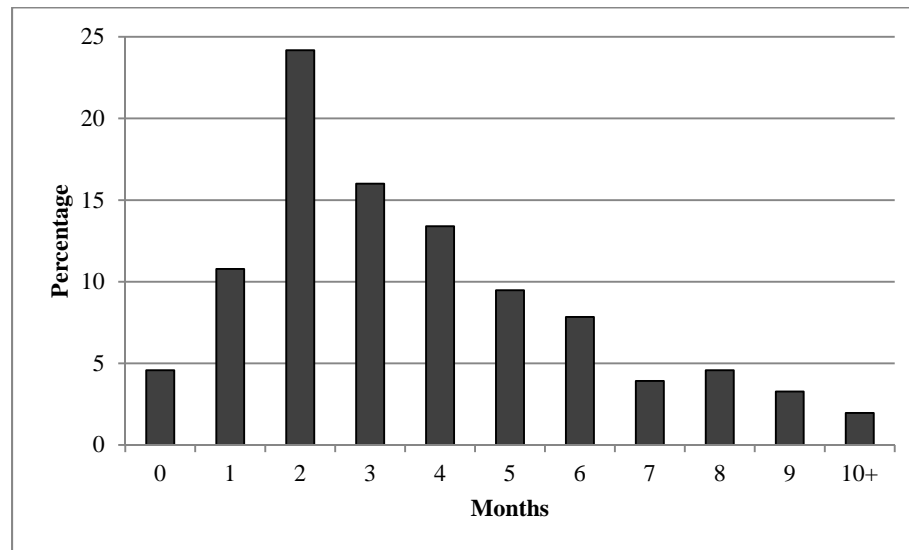
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Jay Lawrence Westbrook, *The Persistence of Local Legal Culture: Twenty Years of Evidence from the Federal Bankruptcy Courts*, 17 HARV. J.L. & PUB. POL'Y 801, 806–07 (1994) (describing the “pervasive, systematic influence” of local legal culture on the bankruptcy system).

113. There is some research that seeks to identify seasonal effects in bankruptcy filings. Compare AS WE FORGIVE, *supra* note 13, at 344–45 (finding some seasonality in bankruptcy filings, including an increase at the end of the summer, but “no post-Christmas rush in the early spring”), with Mann & Porter, *supra* note 91, at 319–22 (finding some evidence of a seasonal filing effect in early spring because the tax refund seems to be used to fund attorney’s fees).

114. Of course, even with one person, there is the question of whether that coder was reliable. While an estimate of reliability was measured for the court records data, *see infra* subpart III(C), there is no feasible way to construct such a measure for interviews, where replication is not possible.

Figure 1. Months Elapsed Between Study Interview and When Debtor Stopped Paying Trustee



Source: Chapter 13 Dropout Study

Note:  $N = 303$

From each list of terminated cases, I drew a random sample. The lists varied in size from one hundred cases to five hundred cases.<sup>115</sup> The total random sample from the five lists was 1,200 cases. This number was ultimately reduced by eleven debtors, for reasons I explain in subparts III(C) and (D), *infra*.

Like most empirical studies, the Chapter 13 Dropout Study reflects data from particular moments in time. The cases in this sample ended in 2010 but began in varying years, primarily 2008, 2009, and 2010. The U.S. economy during this period has been weak, and some cases were filed during a recession; families have struggled in particular with mortgage debts and with the effect of declining home prices. Because many people file Chapter 13 to save their homes, the mortgage problems of this recession may have skewed the sample and the data. It is certainly possible that a study replicating this one in later years (or hypothetically occurring in prior years) would produce different results. There are reasons, however, to doubt the degree of distortion from the recession. First, the one-in-three discharge rate for Chapter 13 has been relatively steady for the last thirty years, including during other

115. The variation in size of the random samples was a result of differing capacities for handling the data collection process.



recessions.<sup>116</sup> More recently, the 2007 Consumer Bankruptcy Project has updated the status of the approximately seven hundred Chapter 13 cases in its random national sample. In the first four years after being filed in 2007, 59% of Chapter 13 cases in that sample ended in dismissal or conversion.<sup>117</sup> While this is below the typical 66% figure, a few more cases will likely end without discharge in the final year of repayment. This statistic, plus its projected trend, suggests that any distortion from nontraditional mortgages, high unemployment, or the recession is not wholly altering outcomes in Chapter 13. If anything, the finding from the 2007 Consumer Bankruptcy Project suggests that slightly fewer debtors are dropping out of Chapter 13 during the recession. This would mean that the Chapter 13 system may be performing slightly better than usual during the period of the Chapter 13 Dropout Study. At this point, one cannot untangle whether any variation from the 66% nondischarge rate stems from the recession, the 2005 amendments to the Bankruptcy Code, or the timing of sampling.

To the extent that there are changes in Chapter 13 outcomes from various economic factors, it remains important to observe how Chapter 13 debtors fare at this moment in time. While financial distress from overindebtedness occurs in boom economies as well, it may be most socially important to have a well-functioning bankruptcy system in dire economic conditions such as those the United States has experienced in the last few years. I also cannot eliminate the possibility that Chapter 13 outcomes are skewed in a positive direction by the unusual economic conditions. For example, people may be less likely to seek Chapter 13 relief when their homes are declining in value; with fewer homeowners coming into Chapter 13, the statistics on home-saving may be dampened. On balance, given the steady rate of dismissal in this time period, I believe that this study's sample is useful for making generalizations about the Chapter 13 system.

### C. Data Collection Process

The primary research instrument in this study was a computer-assisted telephone interview. The software prompted the interviewer with the applicable questions for each debtor (including adjustments based on prior answers), displayed them on screen for the interviewer to read aloud to the debtor, and simultaneously permitted the interviewer to record the debtor's answers.

The questions, as described above in subpart III(A), focused on documenting debtors' outcomes at the time they exited Chapter 13. The design of the interview involved several stages. First, I spoke with

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116. For data on Chapter 13 plan completion since 1978, see *supra* notes 23–26 and accompanying text.

117. Data from the 2007 Consumer Bankruptcy Project (on file with author). The remaining 41% of cases in the sample are either pending or a Chapter 13 discharge has been entered.

professionals who work in the Chapter 13 system, including trustees, judges, and attorneys, to help identify appropriate options for closed-ended responses. After drafting the interview questions, I repeatedly revised and tested them. This included having the interview questions reviewed by a sociologist with expertise in surveying bankruptcy debtors and by the UC Berkeley Center for Survey Research. After revisions, the questions were tested for ease of reading aloud and to gauge the length of the interview. I paid considerable attention in writing the questions and responses to ensuring that the interview was logically organized and that people with high-school educations who had no legal training could understand the questions. When the interview was finalized, a custom computer-assisted interview platform was written. Practice interviews were completed before the data collection began to familiarize the interviewer with the database and the questions.

To invite debtors to participate in the interview, I mailed a letter to the debtor in each case in the random sample. Approximately 10% of these letters were returned as undeliverable; these cases were replaced with randomly drawn cases from the universe of cases for the corresponding week. After data collection ended, a few mailings were returned as undeliverable and were not replaced. These instances reduced the final sample of debtors contacted by letter to participate from 1,200 to 1,189.

The debtors' names and addresses were provided by AACER as part of the case information it gathers when it obtains court record data. If a case was filed jointly, the letter was addressed to both spouses. When debtors were contacted, we interviewed any adult person in the household, even if he or she had not technically been a debtor because a single petition was filed. We inquired, however, if the nondebtor spouse was very familiar with the debtor's bankruptcy case. Herein, the respondents will be called "debtors," although technically a few were not debtors but rather adults living with a debtor.

The letter of invitation for the study contained the required elements of consent for academic research on human subjects and explained the purpose of the study. The letter told debtors that if they participated in the study they would be provided a \$50 gift card to their choice of Target or Walmart. A Spanish-language version was printed on the reverse side of the letter. Enclosed with the letter were a participation form and an addressed, stamped envelope for the return of the participation form. The letter also provided a toll-free number that debtors could call to be interviewed. Upon receipt of a request to participate, an interview was scheduled and completed at the debtor's convenience.

About two weeks after the initial mailing, debtors who had not yet responded to the initial letter were contacted by telephone if possible. Telephone numbers are not provided on bankruptcy court records except for pro se debtors. Public search engines and a for-fee service were used to

attempt to locate telephone numbers, but ultimately, valid phone numbers were only found for about half of the debtors.<sup>118</sup> About four to six weeks after the initial mailing, a follow-up reminder letter was sent to debtors who had not completed interviews. People who declined to participate were never contacted subsequent to their refusal.

The telephone interview database permitted all data to be coded simultaneously with the interviews. The questions were primarily closed-ended, such that a specific response was selected to match a respondent's answer. Interviewers coded all responses to open-ended questions, as well as any additional spontaneous comments, into overflow. The data set is nearly complete for all items for all interview participants. There are few missing data, and refusals to individual interview items (captured by "don't know" and "no answer" responses) were rare. The interviews averaged forty-five minutes in length, although some were over an hour.

The study gathered a second type of data to supplement the interview data. For each completed interview, data were coded from the debtors' bankruptcy court records. The records were downloaded from PACER, the government's online access system for the courts. These data provide a more complete profile of each debtor's situation at the time of bankruptcy. Variables include the existence, chapter, and date of any prior bankruptcy; assets, debts, income, and expenses; and demographic information such as homeownership status and occupation. Details about the length and structure of the Chapter 13 repayment plans were also coded. For each case, approximately 140 variables were coded. A random sample of 10% of the cases (30 cases) were coded a second time. This recoding was blind—that is, it was done without the coder knowing that it was a recoded case and without access to the initial coding. I compared every variable for every case and noted differences. Discrepancies were noted in less than 0.5% of the data.

The data from these court records and the telephone interviews were matched for each participant and merged together for analysis. I primarily use telephone interview data for the analysis in this Article.

#### *D. Sample Characteristics*

The study completed interviews with 303 debtors.<sup>119</sup> Two interviews were conducted in Spanish; the remaining 301 were conducted in English. Demographically, the participants in this study appear to be similar to participants in other studies, including the 2007 Consumer Bankruptcy

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118. For half of the debtors, no phone number at all could be located, any numbers that could be located were disconnected, or it was confirmed by in-person conversation or answering-machine messages that the number was not for the debtor household.

119. Appropriate sample size depends on the population studied, the incidence of the characteristics estimated, and other factors. See FLOYD J. FOWLER, JR., *SURVEY RESEARCH METHODS* 40–43 (rev. ed. 1988) (discussing inadequate approaches to determining sample size but noting the absence of a single right answer).

Project.<sup>120</sup> Generally, the debtors in this study meet many of the traditional definitions for membership in the middle class.<sup>121</sup> For these analyses, data are presented on those interviewed because there was no statistically significant difference in the demographic variables between the people interviewed and their spouses/partners.<sup>122</sup> The typical (median) interview respondent had “some college but not a four-year degree.” About three-fourths (74%) of households owned a home at the time of bankruptcy. This is consistent with the idea that families choosing Chapter 13 have some assets that they might want to preserve in bankruptcy. The average age of interview respondents was forty-nine years. A male completed the interview in 38% of the sample.

The race data are important in light of very recent work showing that African-Americans are overrepresented in Chapter 13 as compared to Chapter 7.<sup>123</sup> Because debtors could select multiple racial identifications, and the full presentation of such results would be cumbersome, I used a protocol to categorize each interview respondent as a single race or ethnicity,<sup>124</sup> which essentially treated people as members of a minority group even if they also self-identified as white.<sup>125</sup> Under this protocol, 53% of interview respondents were white and 36% percent were black. Hispanics represented only 7% of the sample, and the remaining 4% of “other” included Asians and other racial self-identifications. Based on the race data from the 2007 Consumer Bankruptcy Project, these figures seem to approximately reflect all Chapter 13 filers.<sup>126</sup> The largest disparity may be a lower number of

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120. See, e.g., DEBORAH THORNE ET AL., AARP PUB. POL’Y INST., GENERATIONS OF STRUGGLE 3 (2008) (reporting a median age of 43 for bankruptcy filers in 2007); Dov Cohen & Robert M. Lawless, *Less Forgiven: Race and Chapter 13 Bankruptcy*, in BROKE, *supra* note 29 (manuscript at 175, 177) (reporting that African-Americans are over-represented in Chapter 13 bankruptcy filings).

121. Cf. Elizabeth Warren & Deborah Thorne, *A Vulnerable Middle Class: Bankruptcy and Class Status*, in BROKE, *supra* note 29 (manuscript at 25, 25) (“Studies conducted by the Consumer Bankruptcy Project . . . in 1991, 2001, and 2007 consistently demonstrate that bankruptcy is a largely middle-class phenomenon.”).

122. I conducted t-tests for interview respondents and their spouses/partners for the age, education, and race variables; *p*-values were less than .05 for each variable.

123. Cohen & Lawless, *supra* note 120.

124. Although the U.S. Census considers race and Hispanic origin to be distinct, the interview gave Hispanic/Latino as an option, along with white, African-American, Asian-American, or other.

125. The exact protocol was as follows: Respondents who indicated a racial identification of African-American (even if they indicated other races as well) were categorized as African-American. Respondents who indicated a racial identification of Hispanic but did not also identify as African-American were categorized as Hispanic. Respondents who indicated white and no other race were categorized as white. The category of “other” included the remaining respondents: (i) those who indicated white and a race other than African-American or Hispanic, or (ii) those who only indicated racial categories other than white, African-American, or Hispanic—for example, someone who indicated Asian-American as their only racial identification.

126. For example, using the same protocol for racial identification as in this Article, there are 36% African-Americans in the 2007 Consumer Bankruptcy Project sample of Chapter 13 cases. Author’s calculations from the 2007 Consumer Bankruptcy Project (on file with author).

Hispanic participants, although the only available comparison is to Chapter 13 filings—not terminated Chapter 13 cases.<sup>127</sup>

The households exiting Chapter 13 were rarely one-person units. At the time they filed bankruptcy, about half of respondents (49%) were married. Twenty-nine percent were either divorced or separated, and the remainder were either widowed or single. Just over half (53%) of respondents had no children under eighteen years old at the time they filed bankruptcy. Among the half with school-age or younger children, the median number of children was two.

The response rate is always a concern in survey research, and rates are relatively low in telephone surveys compared to in-person studies.<sup>128</sup> Following the widely adopted protocols of the American Association for Public Opinion Research, I collected information to calculate several metrics for response rate. Nonrespondents were divided into three groups: those never reached (noncontacts), those unwilling to cooperate (refusals), and all others (those for whom it would have been difficult or impossible to participate (hearing barrier, hospitalized, etc.)). Using the most conservative metric, the response rate was 25%.

The total sample was 1,189 debtors. This number reflects the eleven instances out of the total sample of 1,200 in which the letter was undeliverable and replacement was not attempted.<sup>129</sup> However, the study could not obtain a valid telephone number for 643 debtors, over half the random list sample. Because this was a telephone survey, and because the mailed letter is a requirement of the University of Iowa Institutional Review Board rather than a part of the study design itself, I calculate the response rates using two different denominators: the 1,189 debtors who were mailed letters, and the 546 debtors for whom the study had valid (or possibly valid) telephone numbers. This latter group includes each debtor with whom the study made no telephone contact (live person or answering machine) but for which we located a connected, possibly valid phone number. The group of 546 debtors also includes people whom agreed to participate in the study but whom ultimately were not interviewed.<sup>130</sup> There were thirty-three debtors in this group; these could be considered passive refusals or noncontacts.

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127. Using the same protocol as in this Article, only 3% of Chapter 13 debtors are Hispanic in the 2007 Consumer Bankruptcy Project sample. Author's calculations from the 2007 Consumer Bankruptcy Project (on file with author).

128. Charlotte Steeh et al., *Are They Really as Bad as They Seem? Nonresponse Rates at the End of the Twentieth Century*, 17 J. OFFICIAL STAT. 227, 227–28 (2001) (reporting that the Council for Marketing and Opinion Research reports a 25% average response rate for all samples and a 12% response rate for random-digit-dialing samples for commercial telephone surveys).

129. One hundred fourteen cases from the sample of 1,189 were replaced with randomly drawn alternates from the initial lists because the letter was returned as undeliverable.

130. Of the 546 debtors, thirty-three returned surveys, called the 1-800 number, or were contacted and scheduled interviews, but they either were no-shows when called for the interviews or could not be contacted for the interviews after their initial agreement to participate.

As Table 1 shows, the final participation rate was 25% for the mailed sample and 55% for those with valid or possibly valid phone numbers. The refusal rates were 7% and 16%, respectively. Refusals were people who either returned participant forms indicating that they did not wish to participate or verbally confirmed by phone that they did not want to participate. This refusal rate would adjust upward somewhat using the passive refusal assumption for the debtors who initially agreed to an interview but ultimately did not participate.

Table 1. Response Rate for Chapter 13 Dropout Study

	<b>Mailed Sample (N = 1,189)</b>	<b>Valid or Possible Valid Phone Sample (N = 546)</b>
<b>Participation Rate</b>	25%	55%
<b>Active Refusal Rate</b>	7%	16%
<b>Possible Passive Refusal Rate</b> (agreed to participate but did not complete interview)	3%	6%
<b>Noncontact Rate</b>	64%	22%
<b>Other Noninterviews</b>	0.3%	0.7%

The major source of nonresponse was noncontacts, as Table 1 shows. Debtors whose phone numbers were impossible to obtain may differ from those with obtainable phone numbers. Younger debtors may be more likely to have only cell phones, which are generally unlisted. In the general population, it is estimated that 20% of households rely exclusively on cell phones.<sup>131</sup> Another source of nonresponse bias may be that debtors who were particularly angry or disappointed about the bankruptcy process were less likely to participate. Finally, debtors who faced the most intense collection pressure or the most severe hardships may have cut off their phones to avoid dunning calls or to save money.

To provide some measure of the nature and extent of nonresponse bias in the telephone survey, I coded bankruptcy court record data for a random sample of debtors who were eligible for the study but who did not complete the interviews.<sup>132</sup> I then compared the respondents and nonrespondents on variables such as income, household size, total assets, total unsecured debts, total debts, and case disposition. For most variables, there was no statistically significant difference in the two groups. There were two exceptions:

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131. John M. Boyle et al., *Cell Phone Mainly Households: Coverage and Reach for Telephone Surveys Using RDD Landline Samples*, SURVEY PRACTICE (Dec. 9, 2009), <http://surveypractice.org/2009/12/09/cell-phone-and-landlines>.

132. Court records were coded for 150 nonrespondents, approximately half the number of respondents (303). In the analysis comparing the two groups, the nonrespondents were weighted double to create groups of approximately equal size for comparison.

Among respondents (those who completed the interview), 27% of cases converted to Chapter 7; the remaining 73% were dismissed from bankruptcy entirely. Among the nonrespondent sample, 19% of cases converted. Because cases that convert to Chapter 7 nearly always result in the debtors getting discharges of their unsecured debts, people with converted cases may have different assessments of Chapter 13 bankruptcy. I explore the data with regard to this point later in the Article.<sup>133</sup> Also, those who responded to the study had, on average, lower actual monthly incomes at the time of bankruptcy than those who did not respond.<sup>134</sup> This result may be unsurprising given the \$50 incentive for completing the interview. It may be that respondents with lower incomes at the time of filing also had lower incomes when they were interviewed, compared to nonrespondents. This could have made the respondents more pessimistic about Chapter 13. It is also possible that people who converted their bankruptcies to Chapter 7 were more likely to have lower incomes, so that the two differences reflect an overlapping group of people. While the court records provide an unusually large amount of data on nonrespondents to permit checks for nonresponse bias, there may still be unmeasured nonresponse bias, such as by race or educational attainment.<sup>135</sup>

#### IV. Findings: The Real Outcomes of Chapter 13

##### A. *Goals of Chapter 13 Debtors*

Chapter 13 offers debtors many legal tools for many kinds of debt problems. Some kinds of secured debts may be written down to the value of the collateral;<sup>136</sup> for other types of secured debt, most notably home mortgages, the remedy is a right to cure a default over a reasonable time.<sup>137</sup> Loans that are shorter than the plan can be re-amortized over the life of the plan.<sup>138</sup> Similarly, unsecured debt obligations may be substantially reduced; if the debtor pays all of his or her disposable income for the life of the repayment plan, any remaining amount of debt is forgiven.<sup>139</sup> Tax creditors may be paid as priority claims,<sup>140</sup> effectively permitting a debtor to devote his or her income to these nondischargeable debts ahead of regular creditors. The point here is not to belabor the details of Chapter 13 but merely to show that its intricacies mean that debtors could reasonably have broad and

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133. See *infra* subpart V(A) for a discussion of how case outcome affected question response.

134. The average respondent had a monthly income of \$3,675; the average nonrespondent had a monthly income of \$4,305, with  $p < .05$  for this difference.

135. The United States does not collect this type of demographic information, although most other countries do so as part of their bankruptcy forms.

136. See *supra* note 78 and accompanying text.

137. See *supra* note 82 and accompanying text.

138. See 11 U.S.C. § 1322(b)(2) (2006) (allowing modification of secured creditors' rights).

139. See *supra* note 72 and accompanying text.

140. 11 U.S.C. § 507(a)(8).

ambitious goals for Chapter 13. Indeed, the very premise of the system is that debtors can do it all: receive a discharge of their unsecured debts (just as in Chapter 7) but, in addition, retain their assets regardless of exempt status, write down or cure their secured debts, and enjoy the automatic stay for the life of the plan.

Each interview with an individual who dropped out of Chapter 13 began with a series of questions on what that debtor hoped to accomplish with bankruptcy. Debtors were asked to respond on a four-point Likert scale<sup>141</sup> whether a particular goal was “very important,” “somewhat important,” “somewhat unimportant,” or “very unimportant.” Eleven closed-ended goals were queried. Then debtors also were asked whether there were any “other things” they wanted to accomplish in bankruptcy and if they responded affirmatively, to describe those other things.

The data are remarkable for the universal strength of debtors’ responses. A majority of debtors responded “very important” to nine of the eleven goals (all except “saving property other than a car or a home”<sup>142</sup> and “dealing with tax debt”<sup>143</sup>). The goals can be broadly grouped into categories: saving property, relieving creditor pressure, and improving a debtor’s financial situation. Figure 2 shows the percentage of respondents that indicated a goal was “very important,” clustered into these three categories (and showing tax debt separately). At least a majority of debtors chose “very important” for every goal. Crucially, these data do not include debtors who indicated “somewhat important.” If that response option were included—effectively transforming the four-point scale into a binary one of “important” or “unimportant”—over 90% of debtors would have indicated that it was important (“very important” or “somewhat important”) to accomplish these goals: saving their home, getting control of their financial situation, getting a fresh start, and repaying as much as they could on their debt.

The data show that debtors do not have a single purpose in filing Chapter 13. When they enter bankruptcy, people have multiple goals. While some might suggest that the large number of goals shows that debtors are unrealistic about bankruptcy, the counterargument is powerful: Chapter 13 actually does provide tools for debtors to achieve each of these goals. These debtors did not report ultra vires goals for bankruptcy such as “raising my income” or “never having to worry about money.” Chapter 13 may have attracted these families precisely because it did not require them to make hard choices—for example, between trying to hang onto a house subject to a large

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141. A Likert scale presents a statement then asks a respondent to choose one response from a range of options representing graduated increments of agreement, frequency, or evaluation regarding the statement. COLLEEN KONICKI DI IORIO, MEASUREMENT IN HEALTH BEHAVIOR: METHODS FOR RESEARCH AND EDUCATION 128–29 (2005).

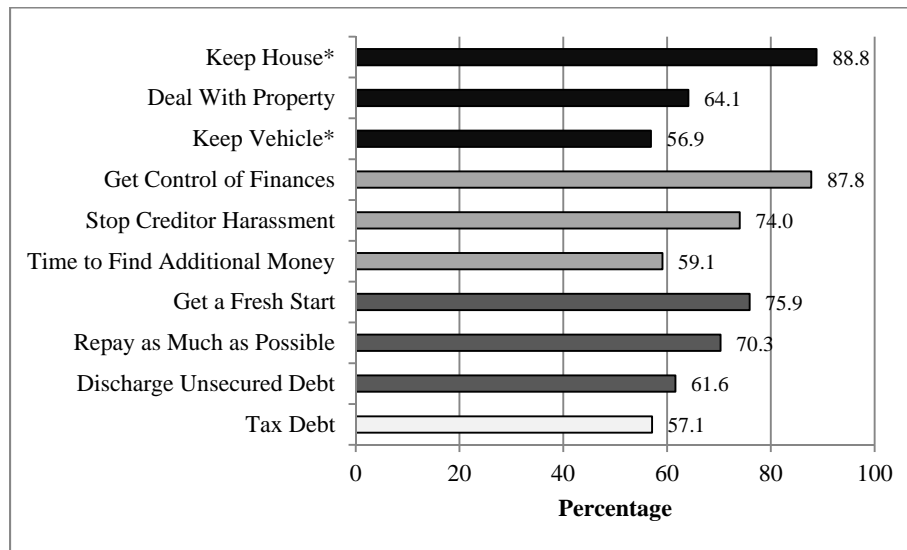
142. This is true only because just 16% of debtors said they had some other property. Among those who did have such property, 67% indicated that saving that property was “very important.”

143. This is true only because fewer than half of debtors owed tax debts. Among those who did owe tax debts, 57% indicated that dealing with their tax debts was “very important.”



mortgage and getting a fresh start in their financial lives. The findings on goals mimic the complexities and contradictions inherent in the structure of Chapter 13.

Figure 2. Percent of Debtors Indicating Particular Goal Was Very Important to Accomplish in Bankruptcy



Source: Chapter 13 Dropout Study

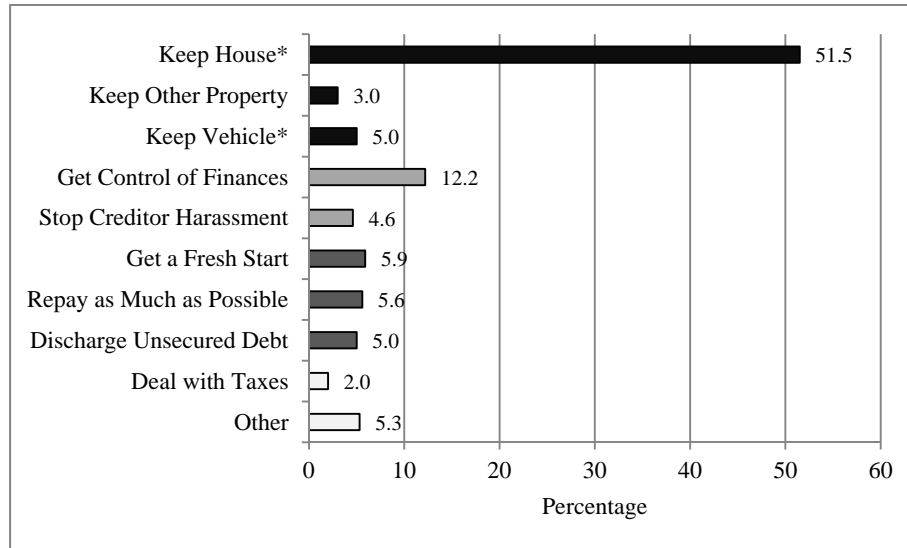
\*Keep House is as percent of homeowners. Keep Vehicle is as percent of car owners.

To have debtors prioritize among their multiple and competing goals, I asked each debtor to select the “single most important goal” from the list of all goals that he or she had identified in the prior interview question as “very important.”<sup>144</sup> Figure 3 shows the results of this question about the single most important goal of each debtor’s Chapter 13 bankruptcy case. Over half (51.5%) of debtors said saving a home was their primary purpose in bankruptcy; this fraction jumps when considering only the responses of homeowners. Even when considering the entire sample, including debtors who rent or live with families or friends, saving one’s home still overwhelms all other goals among Chapter 13 filers. In the this subpart, I explore the home-saving goal in more detail and present additional data on the second most popular goal: getting control of and organizing one’s financial situation. The data show that these two objectives are the key goals for debtors who

144. The vast majority of debtors only selected one response; if a debtor insisted upon giving two answers, both were recorded. These responses were recoded to select the first named goal as the most important response.

exit the bankruptcy system and establish a definite benchmark against which bankruptcy outcomes can be measured.

Figure 3. Most Important Bankruptcy Goal for Chapter 13 Debtors



Source: Chapter 13 Dropout Study

Note: N = 303

\*Keep House is as percent of homeowners. Keep Vehicle is as percent of car owners.

1. *Save the House.*—When enacted in 1978, Chapter 13 provided debtors with significantly improved tools to address defaults on secured debts. The law’s special treatment of home mortgages reveals the government’s support of home ownership.<sup>145</sup> By the early 1990s, Chapter 13 was recognized as a way to effectuate the government’s home ownership policy;<sup>146</sup> this understanding of Chapter 13 as a federal foreclosure-prevention device continues today.<sup>147</sup> Consumers have heard this message

145. See Adam J. Levitin & Joshua Goodman, *The Effect of Bankruptcy Strip-Down on Mortgage Markets* 4 (Georgetown Univ. Law Ctr. Pub. Law & Legal Theory Working Paper Series, Research Paper No. 1087816, 2008), available at <http://ssrn.com/abstract=1087816> (“The policy presumption behind bankruptcy’s special protection for home mortgage lenders is that it enables them to offer lower interest rates and thus encourages home ownership.”).

146. NAT’L BANKR. REVIEW COMM’N, *BANKRUPTCY: THE NEXT TWENTY YEARS* 238 (1997), available at <http://govinfo.library.unt.edu/nbrcreportcont.html> (“Notwithstanding these ‘exceptions to the exception,’ the special protection for mortgage lenders in the Bankruptcy Code is relatively consistent with pervasive federal policies promoting home ownership.”).

147. Marianne B. Culhane, *No Forwarding Address: Losing Homes in Bankruptcy*, in *BROKE*, *supra* note 29 (manuscript at 119, 123) (“Chapter 13 . . . was designed to help debtors keep their homes . . .”); Melissa B. Jacoby, *Home Ownership Risk Beyond a Subprime Crisis: The Role of*

too. Despite a new push of government loan-modification programs and foreclosure-counseling programs, Chapter 13 is still probably the most widespread home-saving device in American law.<sup>148</sup> A strong majority of Chapter 13 filers are homeowners, and most of these homeowners have at least one mortgage.<sup>149</sup>

The households that drop out of Chapter 13 bankruptcy are predominantly homeowners. About three in four households filing for bankruptcy owned their homes when they sought bankruptcy relief. Saving a home was the main goal of an overwhelming portion of these homeowners' bankruptcies. Two measures reveal this. First, 70% of homeowners participating in the study said that saving a home was their single most important goal. Second, 94% of homeowners said that saving a home was either a very important or somewhat important goal of their bankruptcy. This is very close to the fraction of homeowners who said that saving a home was "very important" in a telephone interview conducted as part of the 2007 Consumer Bankruptcy Project, which used a mixed sample of Chapter 7 and Chapter 13 cases (including Chapter 13 cases that could have ended in a discharge).<sup>150</sup>

American families are very attached to their homes, a reality that is easy to lose sight of in the face of news stories about strategic defaults on mortgage loans. Several researchers have documented the strong desire of families to save their homes. Eric Nguyen has identified the presence of school-age children as a strong predictor of whether a bankruptcy debtor gives saving her home as a reason for bankruptcy.<sup>151</sup> Marianne Culhane has documented the social and emotional stakes of losing a home to financial distress:

Bankrupt debtors who lose their homes suffer immediate hard consequences: they must find somewhere else to live, perhaps persuading someone to take them in despite their recent or ongoing bankruptcy; they must pack up belongings and transport what they can afford to take or sell or abandon items too expensive to move or too large for their new residences; and they must leave friends and neighbors behind and move children away from familiar schools. At each of these turns, they face out-of-pocket expenses and the embarrassment of failure in the eyes of their neighbors, children,

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*Delinquency Management*, 76 FORDHAM L. REV. 2261, 2274 (2008) (identifying Chapter 13 as one of the tools homeowners can use to manage a mortgage delinquency).

148. See Jacoby, *supra* note 147, at 2283 (asserting that bankruptcy has become "an important de facto formal law component of mortgage delinquency management").

149. Porter, *supra* note 102, at 141 n.125; see also Raisa Bahchieva et al., *Mortgage Debt, Bankruptcy, and the Sustainability of Homeownership*, in CREDIT MARKETS FOR THE POOR 73, 104 (Patrick Bolton & Howard Rosenthal eds., 2005) (noting that most homeowners filing bankruptcy "face substantial mortgage debts").

150. Culhane, *supra* note 147, at 121–22.

151. Eric S. Nguyen, *Parents in Financial Crisis: Fighting to Keep the Family Home*, 82 AM. BANKR. L.J. 229, 247 (2008).

families, and others. Losing a home is nearly always a step down the social and economic ladder . . . .<sup>152</sup>

The families who exit the Chapter 13 system express similar fears about the consequences of home loss.<sup>153</sup> In describing saving their homes as their most important goal, interview respondents focused on providing stable homes for their children.<sup>154</sup> Other respondents made clear that paying their mortgages to keep their homes came before paying other debts, including those that were more unmanageable or expensive.<sup>155</sup>

Chapter 13 provides tools for addressing defaults on secured loans other than home mortgages; indeed, the law is more generous for many other kinds of secured debt, permitting the debtor to reduce (i.e., cramdown) the loan to the value of the collateral.<sup>156</sup> This legal right can be particularly powerful for cars, which tend to depreciate quickly after purchase. Nine out of ten debtors owned a car at the time they filed bankruptcy, and 71% of these car owners said bankruptcy was very or somewhat important as a way to keep their cars. This is sharply lower than the 94% of homeowners who said saving their homes was either very or somewhat important. Cars may be crucial for some debtors, particularly those facing an immediate repossession, but homes are the main story for families who exit Chapter 13. Debtors wanted to use bankruptcy to avoid losing their homes because of their financial distress.

2. *Get Control of the Financial Situation.*—The other primary goal of families was to use bankruptcy as a way to organize and get control of their financial situations. Figure 3 shows that 12% of debtors said this was their single most important goal. Organizing and getting control, however, was a secondary goal of virtually every family. Over 98% of debtors said that getting control of their financial situation was a very or somewhat important goal for their bankruptcy. That this goal was nearly universally identified suggests that by the time they file bankruptcy, many families are in need of additional structure or tools to manage their financial situations; going it alone has left them feeling that their financial lives are out of control and chaotic.

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152. Culhane, *supra* note 147, at 129.

153. Interview with Respondent W6-089R (“I don’t have anyone to move in with, so I needed to keep it.”). All interviews cited in this Article are part of the Chapter 13 Dropout Study database on file with the author.

154. Interview with Respondent W1-045S (“Keeping the home was the most important thing of all, for my children.”); *id.* (“I had just built this home for our family. It was the first new home—home that no one else had lived in before—that my children had ever had. . . . I wanted to have it for my family.”).

155. Interview with Respondent W5-126R (“It would be between keeping our house and dealing with the student loans, but if I had to choose one, it would be our house.”); Interview with Respondent W4-169D (“All of these were important, but if I had to pick one, keeping the house would be it.”).

156. See *supra* notes 78–80 and accompanying text.

Although the response shows that debtors want order, the survey choice was broadly worded. The high response rate may indicate that many debtors felt like they needed to change their financial lives and set themselves on a different path. Debtors' responses to other closed-ended goals help illuminate the more specific ways in which debtors sought to create breathing room to improve their family finances.

A bankruptcy filing triggers the imposition of an automatic stay against any actions against a debtor or his property.<sup>157</sup> The purpose of the stay is to help debtors get control.<sup>158</sup> But the stay also works simply to delay the perhaps inevitable day of reckoning about one's debts. This is because creditors who wish to take action against debtors must seek relief from the stay by motion to the court,<sup>159</sup> a process that often takes a month or more and involves some expense. This may deter some creditors from taking immediate action even if bankruptcy law gives them that right. Thus, a bankruptcy filing means that most debtors will get an additional two or three months to postpone collection, even if the debtor makes no effort to move his Chapter 13 case forward. If a repayment plan is confirmed, the debtor has even more time, because the automatic stay remains in place until the case is dismissed or a creditor receives relief from the court.

Most debtors reported that obtaining additional time was something they hoped to accomplish with their bankruptcies. Two survey questions probed this issue. When asked how important bankruptcy was as a way to have more time to deal with their property, 75% of debtors said this was a very or somewhat important objective for their filings. When asked how important bankruptcy was as a way to have more time to find additional money to deal with their debts, 78% of debtors said this was very or somewhat important. In total, more than 85% of debtors identified one of these two additional-time goals as important. Only a handful of debtors offered any specific information on how they hoped to obtain more money or the strategies they needed more time to deploy with regard to their property. It may be that debtors had never clearly identified the actual ways in which more time would let them find more money or deal with their defaults on secured debts.

The final question that touched on getting control of one's finances asked about stopping harassment from creditors. Eighty-six percent of debtors said this was very or somewhat important. This is consistent with research suggesting that dunning calls, rather than formal legal action, are the most powerful trigger for pushing a financially distressed consumer into

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157. 11 U.S.C. § 362(a) (2006).

158. See *In re Siciliano*, 13 F.3d 748, 750 (3d Cir. 1994) ("The purpose of the automatic stay provision is to afford the debtor a 'breathing spell' by halting the collection process. It enables the debtor to attempt a repayment or reorganization plan with an aim toward satisfying existing debt.").

159. 11 U.S.C. § 362(d).

bankruptcy.<sup>160</sup> Respondents described the pressure before bankruptcy by noting that “[c]alls were all day long and every day,”<sup>161</sup> and speculating that “Wells Fargo had [them] on a speed dial.”<sup>162</sup>

The overall importance to Chapter 13 filers of achieving breathing room from their creditors is highlighted by examining the cumulative responses to the four questions regarding bankruptcy goals discussed above: obtaining more time to deal with property, obtaining more time to find additional money, organizing and getting control of one’s financial situation, and stopping creditor harassment. More than four out of five debtors (83%) said that *all four* of these goals were either very or somewhat important to accomplish with their bankruptcies. The automatic stay in bankruptcy halts all direct creditor pressure from the very first day of the filing. A bankruptcy filing is a uniquely powerful tool for a family that wants to reduce stress from debt collection efforts and gain time to develop a plan for its debt problems.

*B. Immediate Outcomes: “Good While It Lasted”*

The interview asked the debtors to evaluate whether their most important goal in bankruptcy was accomplished. The debtors’ responses to this inquiry seem to suggest that Chapter 13 filers—even this sample of filers who dropped out of Chapter 13—were successful. When read back what they had said earlier in the interview was their most important goal and asked how much they agreed that this goal was accomplished by their bankruptcies, debtors generally were positive about bankruptcy’s efficacy. Over two-thirds (68.5%) of debtors said they either very much agreed (42.7%) or somewhat agreed (25.8%) that the debtor’s single most important goal was accomplished in bankruptcy. Only about three in ten debtors (31.5%) were pessimistic about whether bankruptcy accomplished the debtor’s most important goal, saying they somewhat or very much disagreed with that statement about the outcomes of their bankruptcies. These findings seem to support the alternate theory of Chapter 13—that consumers are exiting Chapter 13 voluntarily because they no longer need additional relief—and to indicate that the lack of bankruptcy discharges does not mean these cases did not provide help to debtors.

Debtors also were positive about their decisions to file bankruptcy, even after their cases ended without completion. Figure 4 illustrates responses to the following questions: “Looking back on the bankruptcy, how good of a decision do you think filing bankruptcy was? Was it a very good decision, a somewhat good decision, a somewhat bad decision, or a very bad decision?” Very few debtors said that they thought their decision to file Chapter 13

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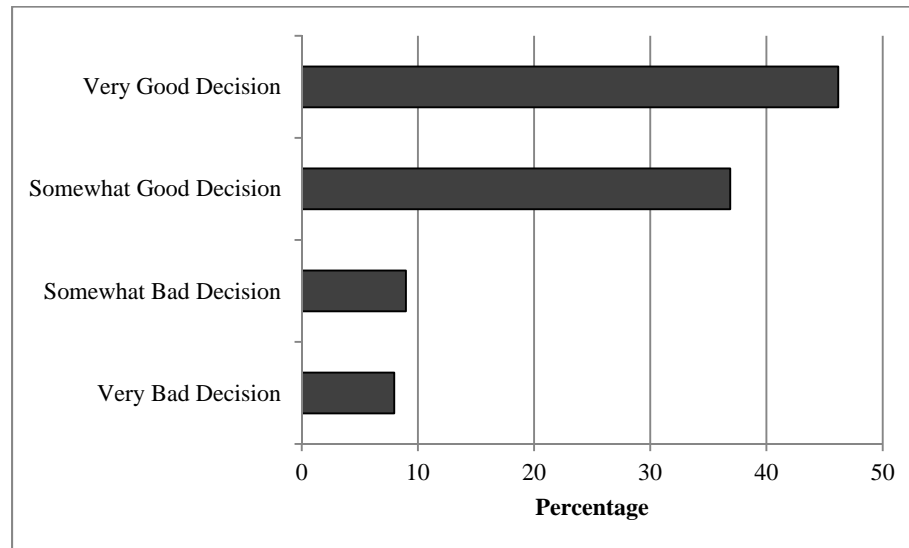
160. Mann & Porter, *supra* note 91, at 330.

161. Interview with Respondent W4-457T.

162. Interview with Respondent W4-218M.

bankruptcy was somewhat or very bad; only 17% of respondents selected either of those two negative categories. It is possible that people were unwilling to admit that they had made bad decisions; however, the 46% of debtors who indicated that filing bankruptcy was a very good decision is such a strong positive response that at least some portion of it likely reflects unbiased answers.

Figure 4. Debtors' Responses to Whether It Was a Good Decision to File Bankruptcy



Source: Chapter 13 Dropout Study

Note:  $N = 301$

The qualitative data suggest that debtors may instead be putting the blame for their bankruptcy outcomes on what they view as their own individual situations. As one debtor explained, "I'm not sure the decision was bad, but it just didn't work out for me."<sup>163</sup> Debtors sometimes pointed to specific events in their lives that hindered Chapter 13 working out as they had hoped. For example, one debtor who filed hoping to address his debts in order to retain a security clearance seemed to see the unrealized potential in bankruptcy, rather than the actual outcome, as the main criterion for evaluating his decision to file bankruptcy. As he said, "The decision was good, but I just didn't get the clearance in time and lost my job. If I hadn't lost my job, I think that my Chapter 13 could have worked."<sup>164</sup>

163. Interview with Respondent W5-007R; *see also* Interview with Respondent W5-181G ("It was a good decision, but it didn't work out.").

164. Interview with Respondent W4-365C.

The debtors' positive opinions about filing bankruptcy counters the idea that many people are duped into filing bankruptcy or into choosing Chapter 13. The large majority (83%) of people reporting that bankruptcy was either a very good or somewhat good decision suggests that people do not regret filing bankruptcy. This does not mean that people accomplished their goals in bankruptcy or that their cases left them better off than they were before bankruptcy. However, as compared to doing nothing, debtors believe bankruptcy was a good choice.

On the question of whether filing bankruptcy was a good decision, debtors' assessments depended on whether their cases were converted or dismissed. Debtors with converted cases were more likely to say that filing bankruptcy was a very good decision (55%), compared to debtors with dismissed cases (43%).<sup>165</sup> Because a conversion more closely approximates the outcome in a Chapter 7 case, this difference undermines the alternate theory that Chapter 13 without a discharge often is equally valuable to debtors than a discharge of their debts. However, it is notable that even those whose cases are dismissed find some benefit in the process.

Taken together, the data on accomplishment of the most important goal and assessment of the bankruptcy filing decision provide support for the alternate theory of Chapter 13. Most debtors who drop out of Chapter 13 are not hostile to the Chapter 13 bankruptcy system, even though it did not work out as intended. To unpack the meaning of these data, I explore in detail in the next two sections the explanations that debtors gave for their answers to whether they accomplished their most important goal in bankruptcy. Consistent with the two main goals identified above, debtors primarily talked about saving their homes and relieving the pressure of financial problems. These qualitative data show more precisely what positive benefits accrue even to those who drop out of Chapter 13.

*1. Hanging onto Homes.*—The homeowners who filed Chapter 13 had a simple, measurable objective: staying in their homes. To evaluate debtors' success in this regard, the interview asked a simple objective question: "Do you still own the same home you did when you filed bankruptcy?" The response shows that bankruptcy is absolutely effective at stymieing foreclosure during, and in the immediate aftermath of, bankruptcy. Only 19% of homeowners lost their houses during bankruptcy or by the time of the interview for the Chapter 13 Dropout Study. Nearly all of these home losses were due to foreclosure. The 19% figure is still notable, however, because when these families filed bankruptcy, foreclosure was often imminent—a matter of mere days or weeks. The typical Chapter 13 debtor owes arrearages equal to six months of mortgage payments by the time he seeks

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165. The difference in mean responses between the groups along the four-point Likert response scale (very good to very bad) is statistically significant.  $p < .05$ .



bankruptcy relief.<sup>166</sup> Yet 81% of homeowners said that they still owned and were living in their home, a result that they attributed to Chapter 13 bankruptcy.

As described above, among debtors who owned a home when filing Chapter 13, 70% identified hanging onto the home as the single most important goal for filing. Bankruptcy clearly met this objective in many debtors' minds. Homeowners described the immediate help they got from Chapter 13: "It stopped the sheriff sale and foreclosure on our house."<sup>167</sup> "I wouldn't still have my home if I hadn't filed. It stopped foreclosure."<sup>168</sup> Another debtor strongly agreed that bankruptcy was effective in dealing with falling behind on his mortgage after a workplace accident: "It kept us from losing our house to foreclosure. At that time, my disability hadn't been approved and I was not able to work as much."<sup>169</sup> This is the traditional story about saving a home in Chapter 13: a debtor has an adverse life event that causes an income shock; this leads to the debtor missing a few payments on his mortgage. Chapter 13 gives the debtor time to catch up on those missed payments as his income stabilizes back to its prior level. But regardless of the reason for the missed payments, most people who enter bankruptcy as homeowners exit bankruptcy as homeowners. Chapter 13 clearly works to derail foreclosures and to arrest imminent home loss.

2. *A Rest for the Financially Weary.*—By the time they file bankruptcy, debtors have often endured months of dunning and threats of legal action.<sup>170</sup> Eighty-four percent of debtors said they were very stressed about their finances right before they filed bankruptcy. This stress partially resulted from contact with debt collectors. Not quite three-fourths of debtors very much agreed with the statement, "Before I filed bankruptcy, pressure from debt collection bothered me or others in my household." This stress manifested itself in arguments about money and strain on marital relationships. Among married debtors, 41% said they argued with their spouses "always" or "often" in the year before bankruptcy.

Debtors described the way that bankruptcy addressed these problems. As one debtor bluntly put it, "I got the creditors off my back."<sup>171</sup> Some debtors praised how bankruptcy halted creditors immediately, seemingly finding that power over the collection dynamic to be a welcome reversal

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166. Katherine Porter, *Arrears and Default Costs of Homeowners*, NACTT Q., Jan.–Feb.–Mar. 2010, at 15, 15.

167. Interview with Respondent W4-370P.

168. Interview with Respondent W4-383H; *see also* Interview with Respondent W4-143D ("I still have my house. It gave me some time and stopped foreclosure."); Interview with Respondent W6-201H ("Filing bankruptcy stopped foreclosure on our house and made it possible for us to keep it.").

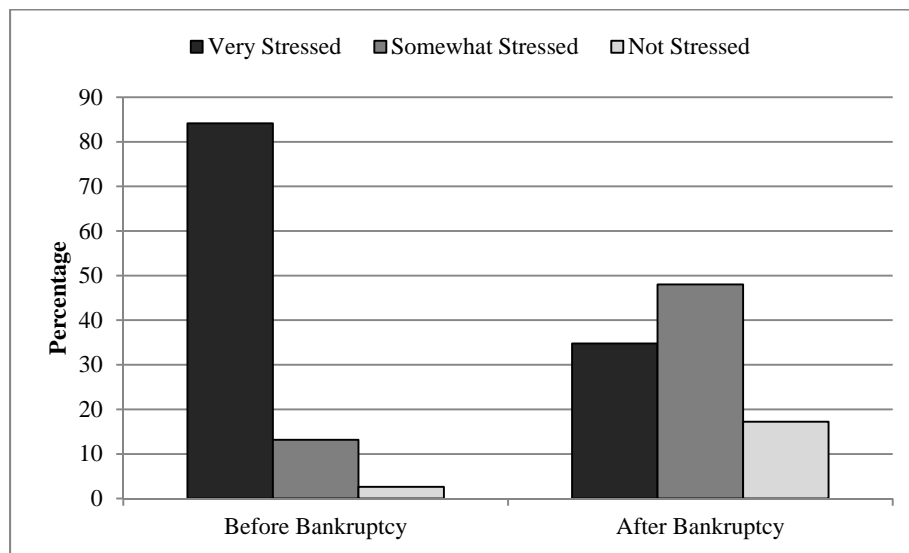
169. Interview with Respondent W4-452R.

170. Mann & Porter, *supra* note 91, at 306–07.

171. Interview with Respondent W4-565K.

from the months before bankruptcy. One debtor described her strategy: “The calls and harassment [have] stopped. Filing bankruptcy is about the only way to stop them. As soon as they hear the ‘B’ word and you give them your case number, they don’t call anymore.”<sup>172</sup> Another debtor spoke as if describing the benefits of Chapter 13 to a prospective filer: “It stops everything in its track[s] and allows you to regroup. It allows you to reorganize your future. It allowed me to emotionally set myself up for success.”<sup>173</sup> Filing bankruptcy gave debtors a welcome respite from constant reminders about their financial difficulties. This break seemed to improved debtors’ sense of well-being in measurable ways.

Figure 5. Self-stress Evaluation of Chapter 13 Debtors Before and After Bankruptcy



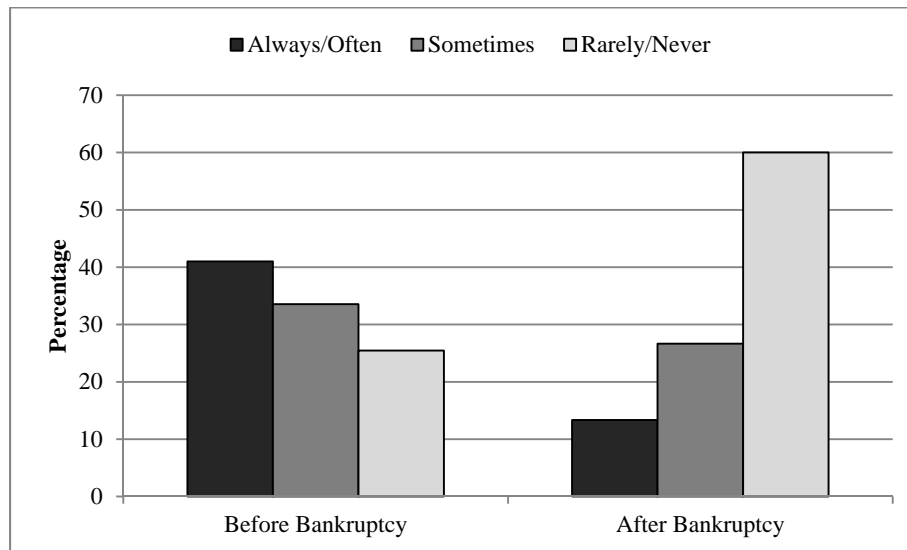
Source: Chapter 13 Dropout Study

Note:  $N = 303$  (before bankruptcy);  $302$  (after bankruptcy)

172. Interview with Respondent W2-029I; *see also* Interview with Respondent W4-479E (“After we filed, we only had one other person call and we referred them to our attorney. It really helped stop the harassment.”); Interview with Respondent W5-129S (“As soon as I filed, they stopped calling. If I did get a call, then I just gave them my case number and they stopped.”).

173. Interview with Respondent W2-053M.

Figure 6. Frequency of Debtors Arguing with Spouse About Money Before and After Bankruptcy



Source: Chapter 13 Dropout Study

Note:  $N = 161$  (before bankruptcy); 150 (after bankruptcy)

As Figures 5 and 6 show, both self-reported stress and marital disagreements over money declined after bankruptcy compared with the period before bankruptcy. Many fewer debtors reported being very stressed about their finances after bankruptcy than before bankruptcy; the percentage dropped from 84% to 35%. Indeed, about one in six debtors reported being not stressed at all at the time of the interview (just after the termination of the bankruptcy). This represents nearly six times more debtors with no stress about their financial situations than the number that existed at the time of bankruptcy. Families that filed Chapter 13 bankruptcy had legitimate reasons to be positive about their decision to file. During bankruptcy, most families not only stayed in their homes but also did so while enjoying a better quality of life. Free from dunning calls and anxiety about repossession or foreclosure, these debtors could spend time with their children and spouses and go to work without daily reminders of their financial straits.

### C. Final Outcomes: “Nowhere to Turn”

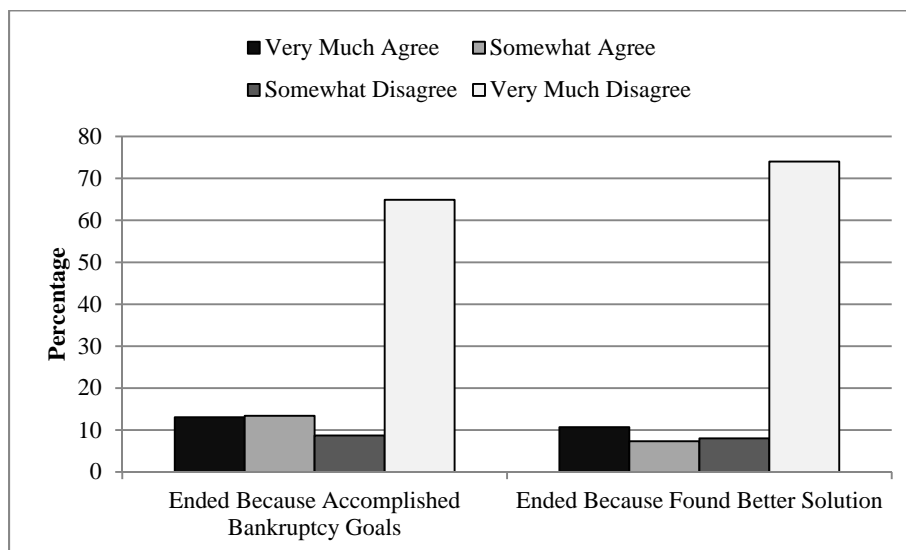
The data are clear that most people who end their Chapter 13 cases without completing their repayment plans still see important benefits from bankruptcy. Foreclosures and collection calls are halted, and families remain in their homes with less emotional strain from their financial problems. These are real outcomes, but they may be only temporary. In fact, the home saving and the stress relief will not endure for the majority of those who exit

Chapter 13. Those were benefits of *being in* bankruptcy, not of having gone through bankruptcy and coming out on the other side. The relief from foreclosure and creditor calls will evaporate for most debtors without the protection of an active bankruptcy case.

As the data show in the next two sections, most debtors will not ultimately achieve their goals of saving their homes or getting relief from debt collection. Even just a few weeks after their bankruptcies had ended, more than half of homeowners were already behind on their payments and facing foreclosure, and more than half of debtors had already begun to get collection calls. Most importantly, with the exception of the 27% of debtors in the sample who converted their Chapter 13 cases to Chapter 7, these dropout debtors still owed all of their outstanding debts. These data are particularly depressing when put in context of the debtors' case terminations. The interview data reflect the outcomes when debtors were interviewed. In the following weeks and months, many debtors' situations likely changed for the worse. As creditors noticed the case terminations and ramped up their collection processes, more creditors would start to dun the debtor, and more debtors would again face the imminent loss of their homes to foreclosure.

Debtors had some sense of this impending reality, especially when pressed to explain why their bankruptcy cases ended. The vast majority of debtors disagreed that their bankruptcy cases ended because they had accomplished what they wanted to with their bankruptcies. As shown on the left-hand side of Figure 7, only 13% of debtors very much agreed with that statement, and another 13% somewhat agreed with that statement. More strikingly, 65% of debtors very much disagreed that their bankruptcy fit the alternate theory of Chapter 13—a truly voluntary dismissal because the debtor had succeeded in the case. The remaining 9% somewhat disagreed that their bankruptcy ended because they accomplished their goals. While an incomplete Chapter 13 bankruptcy may have helped with the most important goal of getting more time in their homes or giving them some breathing room, such a case did not bring full relief. The stay may have put off the dreaded home loss or collection suit, but these results did not last beyond the bankruptcy case.

Figure 7. Debtors' Agreement with Statements on Their Bankruptcies Having Ended



Source: Chapter 13 Dropout Study

Note:  $N = 299$  (accomplished goals); 300 (better solution)

The parallel data on the right-hand side of Figure 7 show that about three-fourths (74%) of debtors that ended Chapter 13 bankruptcy did not have a better solution than bankruptcy.<sup>174</sup> Having exited the legal system, few were confident that they had other ideas to address their remaining financial problems—including the delinquencies on their mortgage loans and the collection pressures from their unsecured debt burdens described below.

The minority of debtors (18%) who very much agreed or somewhat agreed with the statement that they ended their bankruptcies because of a better solution were asked to identify the better solution. The answers are troubling. Most debtors did not seem to be pinning their financial futures on reliable strategies. Over one-third of those who said they found a better solution were hoping to obtain loan modifications on their mortgages, often by negotiating with their lenders.<sup>175</sup> Yet the rate of approved loan modifications outside of bankruptcy is very low.<sup>176</sup> Many months after its rollout, the

174. Limiting this question only to those whose cases were dismissed (for whom the question makes more sense than for those with converted cases), outcomes are only modestly more positive, with 71% of those debtors saying they very much disagree that they found a better solution.

175. Seventy-two people did *not* “very much disagree” with the statement that their bankruptcies ended because they found a better solution. Of these people, twenty-eight people specifically mentioned a loan modification or a negotiation with their mortgage creditor.

176. Cf. *Progress of the Making Home Affordable Program: What Are the Outcomes for Homeowners and What Are the Obstacles to Success: Hearing Before the Subcomm. on Hous. &*

federal government's HAMP program had achieved only 421,804 permanent modifications from among the 1,051,555 trial modifications that struggling homeowners undertook.<sup>177</sup> Given that many people who contacted HAMP were never even offered a trial modification, loan modification has an even lower success rate than Chapter 13. Considering that the debtors participating in this study already found Chapter 13 too difficult to complete, their odds for a successful loan modification appear low.<sup>178</sup>

1. *Home Today, Gone Tomorrow*.—While most people (81%) who went into bankruptcy as homeowners technically exited as homeowners, that status was precarious. At the time of the interviews for this study, six out of ten debtors who were still homeowners said they were not current on their mortgage payments. The mortgage companies, freed from the waiting game of bankruptcy, had taken notice of dismissal of their borrowers' Chapter 13 bankruptcy. Among those who were delinquent, half already faced a pending foreclosure action at the time of the interviews. This means that a total of 28% of all debtors who owned their homes at the time of the interview were at imminent risk of losing those homes to foreclosure.

The interview also asked if debtors were having trouble paying their mortgage debts since their bankruptcies had ended. Just over one-third of homeowners said "yes" in response to this question. When the numbers are put together (lost home already for financial reasons, not current on payments/pending foreclosure, and struggling to pay the mortgage), the rate of home loss or threatened home loss exceeded 70% among all those who were homeowners when they filed bankruptcy.

These are grim numbers, and debtors in this situation tended to be somewhat bleak about the benefits of bankruptcy. As one debtor explained, "I'm still living in my home, but I'm going to lose it. [Bankruptcy] bought me some time here, but that's about it."<sup>179</sup> Another debtor noted that neither bankruptcy nor the federal government's HAMP program could help him save his home.

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*Cnty. Opportunity of the H. Comm. on Fin. Servs.*, 111th Cong. 90 (2009) (statement of Alys Cohen, Staff Attorney, National Consumer Law Center) (testifying that the number of mortgage modifications made with the assistance of HAMP through the fall of 2009 was "paltry compared to the volume of foreclosures").

177. See CONG. OVERSIGHT PANEL, SEPTEMBER OVERSIGHT REPORT: ASSESSING THE TARP ON THE EVE OF ITS EXPIRATION 49–50 (2010) (stating that there were 412,804 homeowners in permanent modifications, 12,912 homeowners who had left their permanent modification program, and 616,839 failed trial modifications).

178. Some respondents had already tried and failed at loan modifications before bankruptcy. "I was actually trying to work out a loan modification and ran out of time. My mortgage company suggested that I file for bankruptcy." Interview with Respondent W2-064S. Others described their frustrations with the loan modification process, even though they were just a few months into it. Describing his mortgage servicer, one debtor remarked, "They can't get it together. No one knows anything. They all need to be fired. We've sent in four different loan modifications and it's still not right." Interview with Respondent W1-008D.

179. Interview with Respondent W4-528L.

[I] was able to stay in my home for a while. But [after] filing bankruptcy, I didn't qualify for the Obama program. I was unable to renegotiate my loan. So it wasn't accomplished really because the home was foreclosed on. My wife left me and left me with a mortgage payment to pay on my own. So there you go.<sup>180</sup>

Another debtor sounded a cautionary tale about the loan modification process: "I still have my home, but I'm worried about losing it. They called me at 10:00 p.m. the other night and the lady was asking me when I was going to pay \$7,000. I got a loan modification, but they're still calling me."<sup>181</sup> A few debtors admitted that bankruptcy had been futile from the outset.

Much has been made out of the special rules in bankruptcy for home mortgages, which are generally not subject to being written down to the value of the home or to having their payment terms modified.<sup>182</sup> At least some cars, however, are subject to cramdown even after the 2005 Bankruptcy Amendments.<sup>183</sup> Thus, we might expect that homes are a particularly acute example of the difficulties debtors face in using Chapter 13 to retain their assets. To the contrary, however, the data show that debtors are even less successful at saving cars in bankruptcy than they are at saving homes.<sup>184</sup> Nearly three in ten (29.5%) debtors who were delinquent on a vehicle when they filed bankruptcy lost it to repossession or surrendered it to the lender. Among those who still had the same car as when they filed bankruptcy, 37% were delinquent on their payments at the time of the interview. Cumulatively, it appears that as few as 40% of Chapter 13 dropout debtors with delinquencies on car loans at the time of filing may have saved their cars as of the dates of their interviews. The worse performance for cars compared to homes may be because the repossession process is faster than the foreclosure process, thus making lenders more aggressive. Additionally, some debtors may have been willing to part with their cars to make a last sacrifice to try to save their homes.

The crown jewels of Chapter 13 are supposed to be its tools to permit debtors to retain ownership of their assets. On paper, and from a distance, those statutory twists and turns may sparkle, but up close—seen right through the eye of their beholders, the failed Chapter 13 debtors—the gems are fakes. Two recent single-location studies report that home loss is very common among Chapter 13 filers. A study of debtors who filed Chapter 13

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180. Interview with Respondent W2-007A.

181. Interview with Respondent W1-008D.

182. See *supra* note 80 and accompanying text.

183. See 11 U.S.C. § 1325(a) (2006) (exempting many claims secured by vehicles from being stripped down to the value of the vehicle under § 506(a), but still permitting cramdown of such loans under § 1325(a)(5)).

184. Seventy-three percent of debtors no longer owned the vehicles they owned when they filed for bankruptcy. Of those who lost cars, 73% of debtors either had had their cars repossessed or had surrendered them back to the lender because they were in default on their loans.

in Broward County, Florida, in 2007 found that only three years after their filings, 43% of homeowners had already lost their homes to foreclosure and another 22% of homeowners were in the foreclosure process.<sup>185</sup> A study of Chapter 13 debtors in Delaware in 2001–2002 found that 28% of homeowners lost their houses despite filing bankruptcy and that the rate of loss rose to 41% for those who had been delinquent on their mortgages for at least one year before filing bankruptcy.<sup>186</sup> While such rates of home loss might be significantly lower than a similarly situated control group (those in financial trouble that do not seek bankruptcy relief), it is certainly far more than the grand hopes the drafters and advocates of Chapter 13 harbored.

2. *The Next Round of Debt Difficulties.*—In Chapter 13, a discharge of debt is normally not given until all payments to be made under the plan are complete.<sup>187</sup> This is a crucial difference between Chapter 13 and all other chapters in the Bankruptcy Code—one that harshens the consequences of failing to complete a Chapter 13 plan. Examining this study's sample of cases that ended without a discharge shows that people who drop out of Chapter 13 will face significant difficulties in managing the stress and pressures of their unsecured debts without having received a discharge.

On top of their past debts, these families continue to have the problems with income instability and uneven or high expenses that often led to their financial distress in the first place. While these income shortfalls also plague Chapter 7 filers,<sup>188</sup> Chapter 13 filers face a double whammy. Ongoing bills continue to challenge debtors' financial resources after bankruptcy. In this study, 59% of respondents said they had struggled in just the few months since the end of their bankruptcy cases to pay bills such as medical bills, utilities, rent or mortgage, or child support. Simultaneously, prebankruptcy unsecured debts remain problematic because they continue to exist and to be fully collectable. Already, by the time of the interview, four in ten Chapter 13 dropouts had received postbankruptcy collection calls. As creditors update their files to mark the case disposition to dismissal, debtors will have to deal with more dunning. Because they did not discharge a single dollar of unpaid debt in their partial Chapter 13 cases, these families' overall debt-to-income ratios remained, after bankruptcy, at the same unsustainable

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185. Joshua L. Boehm, No Shelter: Chapter 13 Debtors' Home Loss in the Foreclosure Crisis 18–19 & tbl.1 (Apr. 22, 2011) (unpublished manuscript) (on file with author).

186. Sarah W. Carroll & Wenli Li, *The Homeownership Experience of Households in Bankruptcy*, 13 CITYSCAPE: J. POL'Y DEV. & RES., no. 1, 2011, at 113, 123.

187. 11 U.S.C. § 1328(a). There is a provision in the Bankruptcy Code to permit a hardship discharge, but it is used relatively infrequently. *Id.* § 1328(b). Possibly, this is because many debtors eligible for a hardship discharge convert their cases to Chapter 7 instead.

188. See Porter & Thorne, *supra* note 101, at 70 (noting that Chapter 7 bankruptcy “may offer a temporary refuge, but it does not generate sufficient or steady enough income to shelter families with chronic income problems from further economic distress”).



levels where they were. As one debtor said, with a deep sigh, “I have the same income and same debts, and now I have to refile.”<sup>189</sup>

Consistent with a lack of a bankruptcy discharge, many families reported that their financial situations had not improved since filing Chapter 13. Figure 8 shows debtors’ self-assessments of whether their overall financial situations at the time of the interview had improved, stayed about the same, or worsened, compared to when they filed their bankruptcies. Forty-two percent of debtors said their financial situations had improved. However, many of those who were not struggling explained that their financial situations improved because they surrendered their homes or cars to lenders and no longer had to make payments. While this change in financial burdens may well be appropriate and produce lasting benefits to families, it is difficult to square with the objectives of Chapter 13 or the alternate theory of success.

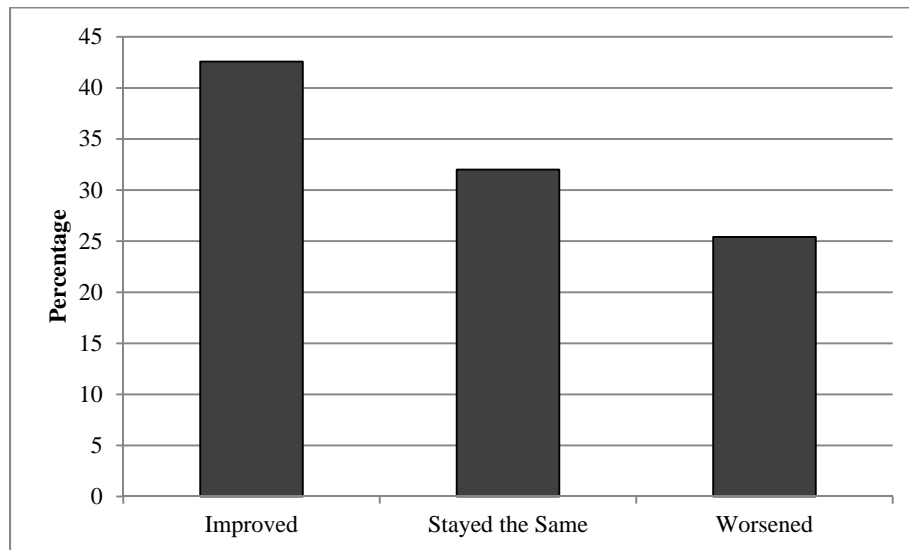
Well over half (57.5%) of households said that their financial situations at the time of the interview were either the same as or worse than the time when they filed bankruptcy. Despite its costs and burdens, bankruptcy did not propel these families forward into better circumstances. It is particularly disheartening that more than one in four families said their financial situations had worsened. Follow-up research on these families would offer insights into bankruptcy as a mobility path. For these families, a very poor outcome from Chapter 13 could be the beginning of a downward spiral that could lead to sustained poverty. Alternatively, if these families’ situations improved as additional months elapsed after bankruptcy, it would be useful to identify any social institutions that helped contribute to a reversal of their declining situation.

The largest percentage (42.5%) of debtors reported an improved financial situation. This finding suggests beneficial effects of Chapter 13 bankruptcy (or at least the absence of deleterious effects that cancel out other positive developments in debtors’ lives). The reference point for the question is important, however, in deciding on the inference to draw from this statistic. Families were making a comparison between the time of the interview and the time that they filed bankruptcy—circumstances that were so dire that the families were prompted to seek legal intervention. While improvement is certainly good news, it does not necessarily indicate that Chapter 13 is delivering a lasting fresh start. Because the relief from creditor pressure was temporary, and ended when the bankruptcy was dismissed, longitudinal research at six months and one year after the end of the bankruptcy cases would help assess whether the improved financial circumstances reported in this study dissipate as collection pressures return.

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189. Interview with Respondent W4-123T.

Figure 8. Debtor Assessment of Change in Overall Financial Situation Between Time of Filing Bankruptcy and Time of Interview



Source: Chapter 13 Dropout Study

Note:  $N = 303$

The debt collectors had already begun to pursue these households only a month or two after their bankruptcies terminated. Forty percent of households said they had already received phone calls from debt collectors. The qualitative data also reflect the degree to which the prebankruptcy harassment is becoming the postbankruptcy outcome. “They started calling as soon as it was over,” explained one debtor.<sup>190</sup> Many debtors missed the respite of bankruptcy, as this debtor did: “Temporarily, [bankruptcy] got creditors and the IRS off my back. But now that my case has ended, they’re all back.”<sup>191</sup> Many debtors made clear that a lack of improvement in their financial situations as a result of Chapter 13 meant that they were in serious financial trouble. “I’m still facing foreclosure on my house, and I’m probably going to lose it. I’m still struggling to pay for things, and my case has been dismissed. I have the same job and pay. They just turned my water off today. Things are still pretty much the same.”<sup>192</sup> This debtor had no water in a house from which she was about to be evicted.

Other debtors echoed that Chapter 13 had simply allowed them to keep falling behind each month because of a gap between their income and expenses. These families struggled even during Chapter 13, experiencing

190. Interview with Respondent W4-235M.

191. Interview with Respondent W4-468R.

192. Interview with Respondent W5-131F.

serious privations. These problems only worsened after bankruptcy. At the time of interview—normally only a month or two after their cases ended—59% of families said they were already struggling with bills. One-third of all those who exited bankruptcy were struggling to pay for food; similar percentages struggled to pay for medicine, doctor bills, and basic utilities. These outcomes are far from debtors' beliefs about what Chapter 13 does to help people. One debtor explained, "When I filed, I thought that I would be able to get a fresh start. This didn't happen. Everything's still the same."<sup>193</sup> Far from a fresh start, a majority of Chapter 13 debtors exit bankruptcy in the same, or even worse, financial circumstances.

The data show that most debtors did not actually succeed in rescuing their homes from foreclosure or in reducing their unsecured debts. Indeed, the data suggest that increased collection pressure and new foreclosure filings were imminent for many families. When bankruptcy sheltered them with its automatic stay, families got to enjoy the pretend solution of Chapter 13. Not able to make their payments, these debtors were on the cusp of realizing the real outcomes of an incomplete Chapter 13 case: loss of their homes and renewed debt collection pressure.

## V. Implications

### A. *Assessing Bankruptcy Outcomes*

Upon first examination, the data shown in Figures 4 and 7 may seem to be a paradox. How could debtors say bankruptcy was a good decision, as reported above, and still report that they did not accomplish their bankruptcy goals, that the problems and pressures that led to their bankruptcies were still problems, and that they had no better alternative to bankruptcy? The answer is that bankruptcy is a pretend solution. After the bankruptcy stay let them reclaim the lives they led before financial distress (existences without foreclosure threats and debt collection), debtors were pacified into thinking bankruptcy worked. But the concrete measures of financial health give the opposite indication: bankruptcy failed.

The apparent paradox between debtors saying bankruptcy was a good decision but being in dire financial trouble is resolved when one realizes that debtors are evaluating bankruptcy against a benchmark of having done nothing. In nearly all cases, the only alternative to bankruptcy was simply giving in and allowing creditors to take property, file lawsuits, and dun them for years. While it may be understandable for people to evaluate Chapter 13 against their prior situation of nonbankruptcy, "better than nothing" is too weak of a standard for policy evaluation. When enacted, Chapter 13 was intended to be a generous system that aids struggling families, not a least-bad alternative to inaction. And today, addressing debt remains a pressing policy

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193. Interview with Respondent W4-250J.

concern. Economists are concerned that future economic growth will be constrained because consumers will struggle to service debt with their incomes rather than engage in current consumption.<sup>194</sup> Bankruptcy relief remains an important part of the economic system, particularly as other protections in the social safety net weaken.<sup>195</sup>

From a policy perspective, Chapter 13 should be evaluated against Chapter 7, the other primary bankruptcy option. The data on Chapter 7 show a discharge rate exceeding 95%.<sup>196</sup> One in three Chapter 13 filings ends in discharge. Among the remaining fraction, those examined in this study, only approximately 20% to 25% achieve relief without a discharge. This works out to about 16% of all Chapter 13 filings ending in relief without discharge. Summing the 33% of discharged cases with the 16% of self-reported positive outcomes in nondischarge cases, I estimate the success rate of Chapter 13 to be less than 50%.

Defenders of Chapter 13 may interpret the data differently. They could suggest yet another possible avenue for debtor success that was not examined in the study. They also could suggest that the study is flawed because it did not sample families that completed their Chapter 13 plans. The latter is a weak critique. In concluding that Chapter 13 works in less than half of cases, I make the assumption (unproven with data) that debtors who receive a Chapter 13 discharge either achieved their goals or that discharge itself is sufficient to call a case a success. This assumption is surely too generous,<sup>197</sup> suggesting that Chapter 13 may fare worse than my findings suggest.

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194. *E.g.*, Reuven Glick & Kevin J. Lansing, *U.S. Household Deleveraging and Future Consumption Growth*, FRBSF ECON. LETTER, May 15, 2009, at 1, 3, available at <http://www.frbsf.org/publications/economics/letter/2009/el2009-16.pdf>.

195. *Cf.* JACOB S. HACKER, *THE GREAT RISK SHIFT* 182 (2006) (arguing that components of the existing social “safety net” were not designed to carry the burdens that they now carry and should be replaced with stronger alternatives).

196. *See* David J. Adler, *Chapter 7 and Its Role in the Current Economy*, in *CHAPTER 7 COMMERCIAL BANKRUPTCY STRATEGIES* 7, 29 (2009) (“[A]s a rule, individual debtors receive a discharge in more than 99 percent of Chapter 7 bankruptcy cases . . .”); *see also* *Chapter 7: Liquidation Under the Bankruptcy Code*, ADMIN. OFF. U.S. COURTS, <http://www.uscourts.gov/FederalCourts/Bankruptcy/BankruptcyBasics/Chapter7.aspx> (“Generally, excluding cases that are dismissed or converted, individual debtors receive a discharge in more than 99 percent of chapter 7 cases.”). Because a few Chapter 7 cases are converted or dismissed, I discount this rate to 95%.

197. My own research on how debtors fare after receiving a Chapter 7 discharge suggests that the bankruptcy system does not ensure families will have stable and healthy financial situations, even in the first year after discharge. *See* Porter & Thorne, *supra* note 101, at 117 (highlighting that nearly a third of families remain financially troubled in the year after filing for bankruptcy). In addition, there are undoubtedly some families who received a Chapter 13 discharge but did not need any other Chapter 13 tools (that is, they had no secured debts). These families may have filed Chapter 13 to take advantage of financing their attorney’s fees over the repayment plan. Such families would have achieved equivalent debt relief in a much shorter period if they had filed Chapter 7.

Admittedly, there is no established threshold for success in a social program.<sup>198</sup> Undoubtedly, for some legal regimes, a success rate of less than 50% (probably closer to 45%) would be seen as a high success rate (for example, the recidivism rate among convicted felons). In the bankruptcy realm, however, especially given the efforts of the last three decades to encourage or force people into Chapter 13 rather than Chapter 7, the 95% discharge rate in Chapter 7 makes the 50% success rate in Chapter 13 look paltry. It is also difficult to defend 50–50 odds as sufficient to satisfy America’s longstanding normative commitment to a robust fresh start for poor but honest debtors.<sup>199</sup>

With American families carrying debt loads that would have been unthinkable even a generation ago,<sup>200</sup> the time for pretending about the 1978 Bankruptcy Code has expired. Chapter 13 does not work as intended. America needs to design and deploy a radical new approach to addressing the problem of overwhelming consumer debt. Tinkering at the margins of the 1978 Code is only adding curlicues onto flourishes. The system is already too expensive, with filing and attorney’s fees often being equal to about 7% of debtors’ annual incomes at filing.<sup>201</sup> Revisions aimed at “fixing” Chapter 13 seem likely only to add further complications to the system, driving up attorney’s fees and limiting access.<sup>202</sup>

The new consumer bankruptcy system should be much simpler. It is not possible to solve every problem in a high-volume legal system. Undoubtedly, a simpler system would eliminate some of the “debtor friendly” tools of the Bankruptcy Code.<sup>203</sup> In its place would be a system of

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198. See Angela Littwin, *The Affordability Paradox: How Consumer Bankruptcy’s Greatest Weakness May Account for Its Surprising Success*, 52 WM. & MARY L. REV. 1933, 1943–44, 2022 (2011) (comparing bankruptcy to disability and welfare and concluding that bankruptcy is significantly more successful).

199. See *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934) (declaring that “one of the primary purposes” of the Bankruptcy Act was to permit the debtor to “start afresh”). As the Supreme Court has stated,

This purpose of the act has been again and again emphasized by the courts as being of public as well as private interest, in that it gives to the honest but unfortunate debtor who surrenders for distribution the property which he owns at the time of bankruptcy, a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of pre[e]xisting debt.

*Id.* (emphasis omitted).

200. Porter, *supra* note 29, at 2, 4.

201. See *supra* notes 89–90 and accompanying text.

202. NAT’L BANKR. REV. COMM’N, *supra* note 146, at 275 (“The complexity of the system prevents the people most in need of relief from receiving it.”).

203. One possible solution to the problems of complexity and choice is a single chapter of bankruptcy for individuals. This is not a new idea. See William C. Whitford, *The Ideal of Individualized Justice: Consumer Bankruptcy as Consumer Protection, and Consumer Protection in Consumer Bankruptcy*, 68 AM. BANKR. L.J. 397, 415 (1994) (“[T]he easiest solution to the problems that I have identified is to simplify the Bankruptcy Code so that consumers are not presented with so many choices. . . . [T]he basic choice between chapter 7 and 13 might be eliminated.”). Such a system would give consumers some of the key tools of Chapter 13, such as the ability to write down

rough justice, but one in which the rough justice is nearly universally delivered. Policy makers need to move beyond the traditional model of sophisticated lawyers providing tailored legal advice and accept that cost concerns mean that consumers will have only very limited access to legal counsel. To make that counseling worthwhile, lawyers need to spend their time gathering factual information from clients. In the current system, counseling by a lawyer who is guided by conventional norms of professionalism likely entails mapping out the twists and turns of the Bankruptcy Code to help the client consider options.<sup>204</sup>

The new consumer bankruptcy system should reject the idea of broad consumer choice. The idea of free and informed selection between Chapter 7 and Chapter 13 was never realistic,<sup>205</sup> given the hours of education and counseling required to help consumers understand the benefits and burdens of the two chapters. William Whitford has observed that this framework creates a new consumer protection problem within the consumer bankruptcy system because of inadequate processes to guide the choice of chapter.<sup>206</sup> Most importantly, adding choices and options does not mean that people actually achieve additional relief.

While this study's data and its methodological approach are new, the critique of Chapter 13 is old. The hard fact is that every single study of the consumer bankruptcy system has concluded that repayment bankruptcies fail to deliver on their promises.<sup>207</sup> The prior critiques of Chapter 13 have been impassioned. In a symposium on the book *As We Forgive Our Debtors*, William Whitford argued for the repeal of Chapter 13.<sup>208</sup> Gordon Bermant has sharply criticized the gap between intent and achievement in Chapter 13. In his words, "The legislature, however benevolent it may have been, first created then repeatedly amended a law of debt adjustment that is ambiguous and convoluted . . . . The result is a cycle of complaint, with each component

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secured debts, but would abandon the idea of a repayment plan and long-term court supervision. The metric for success would be sharply defined: a permanent reduction in consumers' debts, something akin to the current discharge. The National Bankruptcy Conference, a private organization that has focused on improving the bankruptcy system since the 1930s, is working on a proposed single-chapter consumer system. I am a member of the National Bankruptcy Conference and am actively involved in the development of its proposal.

204. See Braucher, *supra* note 45, at 167, 178–79 (noting that consumer bankruptcy attorneys cannot devote much time or energy to litigating points of law and that they do not do consumer workouts, but that they must advise clients on the choice between Chapters 7 and 13).

205. See Whitford, *supra* note 37, at 88–90 (describing why consumers do not and cannot make an informed and self-interested choice between Chapter 7 and Chapter 13 and opining that informed consumer choice about bankruptcy procedure is not a viable option in most instances).

206. Whitford, *supra* note 203, at 403, 406.

207. See, e.g., AS WE FORGIVE, *supra* note 13, at 339 (condemning Chapter 13 as misleading and discouraging to debtors); STANLEY & GIRTH, *supra* note 2, at 105–06 (decrying the deficiencies of Chapter XIII in rehabilitating debtors); Norberg & Velkey, *supra* note 34, at 476–77 (highlighting the high incidence of repeat Chapter 13 filers).

208. Whitford, *supra* note 37, at 88–90.

[judge, trustee, creditors, etc.] laying responsibility off on the others.”<sup>209</sup> These arguments against Chapter 13 were made by eminent scholars. Yet, they failed to defeat the alternative theory of Chapter 13 as a “choose your own bankruptcy adventure” that permitted families to craft custom relief for their financial problems.

In addition to poor outcomes, pretend solutions ensnare consumers and their elected representatives in a web of inaction. In the bankruptcy context, the result has been decades of mistaken belief that Chapter 13—a complex legal system that gives temporary and illusory relief—delivers permanent and real relief to families. The contribution of this Article is not to develop a specific reform proposal,<sup>210</sup> but to argue that reform efforts should resolutely abandon Chapter 13. This Article’s findings may invigorate policy making in the area of overindebtedness. A simpler, redesigned system can articulate a crisp objective and build ways to test progress into the system itself. While the new solution may fall short of its objective,<sup>211</sup> the move away from a pretend solution can clear the way for new ideas and stimulate innovation.

### *B. Features of Pretend Solutions*

The story of Chapter 13 that I tell in this Article can help identify generalizable elements of a pretend solution. In the paragraphs below, I develop a skeletal framework of a pretend solution. This framework will not always fit. Many government programs are not pretend solutions. Some programs have high rates of success; they are widely considered to be solutions (even if not 100% effective), and data support that perception of success. The opposite are nonsolutions, which are widely identified as failures. Such programs may help a few families, but the data show that the

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209. Bermant, *supra* note 18, at 20.

210. I am working on a proposal for a redesigned consumer bankruptcy system. The core features of the system are to alter dramatically the pace of decision making and the timing of lawyer interventions in the process. Building on prior work suggesting a 1-800-DONOTDUN system to shield families from the wear of debt-collection pressure, Mann & Porter, *supra* note 91, at 333, 336, I suggest that the proposed law eases the ability of people to initiate a bankruptcy without lawyer representation. In this new system, consumers would only be asked to make decisions about property retention and repayment after a period of breathing room from dunning. The system would also feature automatic adjustments to repayment obligations if debtors’ income changes. In my view, one of the most significant problems with the existing Chapter 13 is that it presupposes a level of income stability that is unrealistic in today’s economy. See Jacob S. Hacker, *The Middle Class at Risk*, in BROKE, *supra* note 29 (manuscript at 218, 223–25) (reporting that the proportion of working-age families experiencing a year-to-year 25% or greater drop in income increased from 12% in 1985 to 17% in the early 2000s and was projected to have increased to 20% in 2009).

211. In critiquing the Chapter 13 system, I am not suggesting that Chapter 7 is perfect or that addressing overindebtedness is an easy task. My empirical research documents the limitation of Chapter 7 for putting people on a path to financial wellbeing. Porter & Thorne, *supra* note 101, at 124. Overindebtedness brings with it many consequences, some of which are nonfinancial and some of which are macroeconomic in scope. I have written an essay about the difficulty in measuring the harms of overindebtedness, an important prerequisite to designing solutions for the problem. Katherine Porter, *The Damage of Debt*, 69 WASH. & LEE L. REV. (forthcoming Apr. 2012).

programs have serious and widespread shortcomings in delivering on their promises.

And of course, Chapter 13 is only one legal system. The pretend-solution architecture may need to be modified to describe a broader range of social programs. The new concept of a pretend solution, however, can sharpen the assessment of social programs. The term itself is a caution against assuming that a social program works in the absence of any data. Using the consumer bankruptcy system as an example, I identify five elements that contribute to a pretend solution.

The first element of a pretend solution is that the law must have been genuinely intended to help a given constituency or to ameliorate a particular problem. It must provide generous relief that people expect will work. A law that is a farce from its enactment is not a pretend solution. People recognize it as a nonsolution and agitate for alternatives. The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 is a powerful contrast to the 1978 Bankruptcy Code. The 2005 Act was widely criticized for its lack of consumer protection (despite its moniker),<sup>212</sup> whereas in 1978, Congress offered up Chapter 13 in a sincere effort to improve debtors' prospects in bankruptcy.<sup>213</sup> To qualify as a pretend solution, the legislative history and political negotiations of the law should evidence a desire to address a social problem and not merely make an ineffectual statement for political purposes. Perceived generosity sets that stage for a pretend solution because the assumption is that such largesse from the legislature will materialize in the law on the ground.

A second, and related, aspect of a pretend solution is buy-in from experts. Experts have technical knowledge, often more about law than about the underlying social problem to be solved. That is, they know the statutory twists and turns in the solution—such as all the subsections of the Bankruptcy Code—but they may have little to no data or knowledge about the people who file bankruptcy and the situations that lead them to file. When experts craft a legal solution, it is usually reasoned and balances competing concerns. This process, combined with a genuine desire to improve the existing system, results in a detailed set of complex recommendations. In the pretend-solution framework, experts lend legitimacy to the law. Experts are not easily attacked for partisan positions and help reassure lawmakers

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212. See, e.g., Jean Braucher, *A Fresh Start for Personal Bankruptcy Reform: The Need for Simplification and a Single Portal*, 55 AM. U. L. REV. 1295, 1296 (2006) (stating that the Act “commits two counts of intentional fraud in its name alone” in that it “does not do a good job of preventing abuse and also does not protect consumers but rather puts new burdens on all filers, even the worst-off who are clearly not abusers”); Charles J. Tabb, *Consumer Bankruptcy After the Fall: United States Law Under S. 256*, 43 CAN. BUS. L.J. 28, 39 (2006) (asserting that under the Act, “consumer lenders have been given the green light to proceed merrily along the careless path they have chosen”); James J. White, *Abuse Prevention 2005*, 71 MO. L. REV. 863, 866 (2006) (“The principal target of the Act was the debtor.”).

213. See *supra* Part I.



that the solution is a good idea. In the bankruptcy realm, this role was played by both the 1973 and 1997 Bankruptcy Review Commission Reports, the National Bankruptcy Conference, and the bankruptcy trustees (who are neither debtors nor creditors). As outsiders concerned with objectivity and achieving a principled result, these experts often remain dogmatically committed to the theoretical ideas that justified the pretend solution. Even in light of subsequent empirical evidence to the contrary, experts are invested in promoting and defending a system that reflects their expert advice. Acknowledging the contribution of experts to pretend solutions does not suggest that lawmakers should ignore experts or that experts cannot design effective solutions. The key points are more limited. First, expert blessing of legislation makes it harder to later disrupt the assumption that the law is achieving its stated purpose. Second, experts tend toward complexity in design, which inhibits assessment of the program's efficacy.

Third, complexity often accompanies a pretend solution. While not all complex social programs are pretend solutions, the converse will nearly always be true. This is because complexity obscures empirical assessment of outcomes and shields poor results from scrutiny. In complexity's wake, a nonsolution can masquerade as a solution, often for decades. As the history of Chapter 13 illustrates, well-intentioned defenders of a solution can posit multiple theories of a complex law's objectives and divert attention from serious warning signs of system failure. The more outcomes that are possible, the harder it is to discern the real outcomes of the law. Complexity operates to protect the pretend solution. This effect of pretend solutions is insidious, in part because generosity and expert input (both seen as desirable qualities) often lead to complexity.

The fourth feature of a pretend solution is that those to be helped must get at least some initial benefit or believe that they do so. By definition, the relief from a pretend solution is not sufficient to be a real solution. The system must deliver more than a bare promise, however, or those to be helped would avoid the system, and their advocates would protest. The social problem would return to the policy agenda for new ideas. Those actions would expose the solution as pretend, eliminating its harm and leading to alternate approaches. The pretend solution endures over time because it is generous enough to attract people to the program and because it delivers at least an illusion of help. This Article shows that in the Chapter 13 bankruptcy context, the help is partial and temporary, rather than totally illusory. The pretend solution pacifies the people whose problems led to the enactment of a social program and lifts the burden to do more from policy makers, experts, and advocates.

The final quality of a pretend solution is that it does not contain regular, transparent assessment of the program's efficacy. Lack of data can be a function of government bureaucracy, which may resist data collection as either threatening or unrewarding. Government mandates to collect data also may be largely uninformative. The studies and data collection provisions in

the 2005 bankruptcy amendments yielded few insights and little data;<sup>214</sup> more data does not necessarily add knowledge.<sup>215</sup> A related problem is reluctance, caused by either the costs or the hassles, of researchers to move beyond easily obtained data on case termination to obtain more nuanced data on outcomes.<sup>216</sup> Assessment of a program is also difficult when a sharp and fixed consensus on the program's goal is lacking. Complexity and generosity can hinder assessment because when a program tries to do too much, its outcomes become harder to assess. People may differ on which outcomes are worth measuring, as well as on the best way to assess them. Instead of the debtor-survey technique used here, researchers instead might rely on objective measures, such as examining property records to verify homeownership in dismissed or converted Chapter 13 cases. This study offers only one model of how additional data collection beyond legal end results can reveal effects of laws that were previously obscured.

These five elements of a pretend solution help explain why some social programs continue, despite niggling concerns or sporadic naysaying that suggest program failure. The framework of a pretend solution developed here may help guide further research on policy design and assessment. Testing the framework against other social programs may deepen and refine knowledge about how to expose or avoid pretend solutions.

### *C. Identifying and Preventing Pretend Solutions*

In this final subpart of the Article, I expand the idea of the pretend solution beyond bankruptcy. I use the federal foreclosure-prevention program (HAMP) as an example of a social program that avoided being a pretend solution. I show how certain features of HAMP that permitted robust assessment of efficacy were critical to exposing the program's weaknesses

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214. See Katherine Porter, *The Potential and Peril of BAPCPA for Empirical Research*, 71 MO. L. REV. 963, 972–74 (2006) (bemoaning the difficulties in compiling longitudinal data on Chapter 13 debtors and reporting the difficulties and delays plaguing the Government Accountability Office's initial efforts at data gathering).

215. In his paper on court data, Lynn LoPucki seems to assert that increased access to raw data would almost certainly increase knowledge. See generally Lynn M. LoPucki, *Court-System Transparency*, 94 IOWA L. REV. 481 (2009). Yet not all data nor all studies are useful. In the bankruptcy context, the government has begun posting some additional data under the Open Government Initiative, and yet I am not aware of a single study making use of this information. See Chris Haverstock & Phil Crewson, *U.S. Trustee Program Posts Bankruptcy Data on Data.gov Web Site*, EXEC. OFF. FOR U.S. TRUSTEES, [http://www.justice.gov/ust/eo/public\\_affairs/articles/docs/2010/abi\\_201006.pdf](http://www.justice.gov/ust/eo/public_affairs/articles/docs/2010/abi_201006.pdf) (detailing new bankruptcy case data sets and statistical summaries released by the United States Trustee Program).

216. Such data were even more difficult to gather when Professors Sullivan, Warren, and Westbrook conducted their study of bankruptcies filed in 1981. They tell stories of purchasing an airline seat to transport a portable photocopy machine around the country to obtain court records for bankruptcy debtors. Leon Neyfakh, *Elizabeth Warren's Unorthodox Career*, BOS. GLOBE, Oct. 22, 2011, available at <http://www.bostonglobe.com/ideas/2011/10/22/elizabeth-warren-unorthodox-career/3AFEDVW9B40rgbF1bhBXoM/story.html>.

and the need for policy improvements. This illustrates why nonsolutions may be preferable to pretend ones.

Pretend solutions may exist in a number of policy areas. Low-income housing programs, special education, medical care for veterans, social security disability, and foreclosure prevention are possible examples of pretend solutions. Many of these programs are longstanding and reflect impulses to improve recipients' welfare. However, the programs pose delivery challenges and are mired in complexities that may leave them dramatically short of delivering on their promises. The development of these examples is beyond the scope of this Article, and not just for reasons of brevity. Rather, a key point of this Article is that both data collection and deep system knowledge are needed to untangle whether a program is working well or failing badly, and that the challenge in assessment is particularly difficult when a pretend solution exists. The very features of a pretend solution—generosity, complexity, expert participation, modest benefits, and data limitations—are what permit assumptions of success or facile assertions of efficacy to escape challenge. Testing the pretend-solution concept outside of bankruptcy will help refine our knowledge of how pretend solutions develop and why they are able to mask serious deficiencies in programs.

In contrast to a pretend solution, a nonsolution can be readily discerned. A nonsolution is a program that does not work (either at all, or much less frequently than expected); it is widely acknowledged as a failure. There is dissatisfaction or frustration among those who were to be helped, their advocates, and policy makers about the lack of outcomes. That situation gives rise to momentum to design a better system. The federal government's foreclosure-prevention program, HAMP,<sup>217</sup> is an example of a nonsolution. The program lacks most features of a pretend solution. Rather than being too generous, the program was criticized at the outset for being too onerous to consumers.<sup>218</sup> The program was set up hastily, with little time to facilitate and incorporate the advice of experts, including consumer and homeowner

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217. See *Home Affordable Modification Program (HAMP)*, MAKING HOME AFFORDABLE, <http://www.makinghomeaffordable.gov/programs/lower-payments/Pages/hamp.aspx> (last updated Feb. 10, 2011) (providing news and information about the HAMP program to consumers).

218. See, e.g., *Foreclosure Prevention Part II: Are Loan Servicers Honoring Their Commitments to Help Preserve Homeownership? Hearing Before the H. Comm. on Oversight & Gov't Reform*, 111th Cong. 638 (2010) (statement of Elise Brown, Supervising Attorney, Foreclosure Prevention Project, MFY Legal Services, Inc.) (“A process that is intended to be ‘bold and swift’ in order to ‘arrest this downward spiral’ of foreclosures . . . is the complete opposite and reflects a failed system in which servicers take advantage of the homeowners’ vulnerabilities.” (footnote omitted)); *Hearing Before the Cong. Oversight Panel*, 111th Cong. 19 (2009) (statement of Herbert M. Allison, Jr., Assistant Secretary for Financial Stability, U.S. Department of the Treasury) (explaining six months after the program’s inception that reforms were planned for HAMP in response to criticism because “[w]e do not want eligible borrowers to fail the trial period because the document requirements are unnecessarily burdensome”); Karyn Datko, *HAMP Is a Failure: Here’s Why*, SMART SPENDING (Feb. 3, 2011, 8:25 PM), <http://money.msn.com/saving-money-tips/post.aspx?post=c124f733-e80a-4582-b236-0128df523ab4> (“Many [banks] complain that [the HAMP] requirements are too strict.”).

advocates.<sup>219</sup> The result was that the program lacked a presumption of success at its outset. Equally important, HAMP had a testable outcome: to save houses from foreclosure. The outcome was simple and binary. There was little temporary relief to pacify homeowners because foreclosures were often completed even as people repeatedly called or wrote to plead for a loan modification.<sup>220</sup> The declining housing market also ensured that policy makers stayed attuned to the program's effectiveness. Most importantly, perhaps, the President established a clear, measurable objective at HAMP's inception,<sup>221</sup> and funded HAMP through TARP. All TARP programs were immediately subject to Congressional Oversight Panel reporting and monitoring.<sup>222</sup> Report after report on HAMP, written in clear language and disseminated to the public through a media blitz, stated plainly that the vast majority of troubled homeowners simply did not get any help.<sup>223</sup> As millions of Americans lost their homes to foreclosure, we know that the government's loan modification program simply did not achieve its goal.<sup>224</sup>

The HAMP experience, as well as the approach of this study to assessing Chapter 13, holds important lessons for policy design. While there are myriad challenges to designing a program that delivers real relief, there is one relatively simple way to avoid a pretend solution: a requirement for regular, transparent outcome data must be built into the program at its inception. This requirement forces policy makers to define more sharply

219. See, e.g., Alan White, *HAMP: Is It Helping?*, CONSUMER L. & POL'Y BLOG (Aug. 4, 2009, 11:36 AM), <http://pubcit.typepad.com/clpblog/2009/08/hamp-is-it-helping.html> (arguing that "HAMP does nothing to address the necessary reduction in principal mortgage debt that is a precondition to long-term recovery of the housing market, and the economy," and that "the Administration and the mortgage industry have vigorously resisted addressing" alternative solutions).

220. See Andrew Martin & Michael Powell, *Two States Sue Bank of America Over Mortgages*, N.Y. TIMES, Dec. 17, 2010, available at <http://www.nytimes.com/2010/12/18/business/18mortgage.html> (reporting that the attorneys general of Nevada and Arizona filed a suit against Bank of America for "assuring customers that they would not be foreclosed upon while they were seeking loan modifications, only to proceed with foreclosures anyway").

221. In his speech announcing the creation of HAMP, President Obama said that it would "enable as many as 3 to 4 million homeowners to modify the terms of their mortgages to avoid foreclosure." See *supra* note 57.

222. See *supra* note 58 and accompanying text.

223. See *supra* notes 57–61 and accompanying text; see also Jean Braucher, *Humpty Dumpty and the Foreclosure Crisis: Lessons from the Lackluster First Year of the Home Affordable Modification Program (HAMP)*, 52 ARIZ. L. REV. 727, 727 (2010) ("After a year of operations, . . . only about 230,000 [of the expected three to four million] borrowers had entered into permanent HAMP modifications, and even these were not necessarily truly permanent.").

224. See Editorial, *The Foreclosure Crises*, N.Y. TIMES, Oct. 14, 2010, available at <http://www.nytimes.com/2010/10/15/opinion/15fri1.html> ("According to the latest figures, 4.2 million loans are now in or near foreclosure. An estimated 3.5 million homes will be lost by the end of 2012, on top of 6.2 million already lost. Yet the administration's main ant foreclosure effort has modified fewer than 500,000 loans in about 18 months."); Sheryl Gay Stolberg & Edmund L. Andrews, *\$275 Billion Plan Seeks to Address Crisis in Housing*, N.Y. TIMES, Feb. 19, 2009, at A1 (reporting on the Obama Administration's claim that the mortgage-relief program would save about four million people from losing their homes).

what they hope to accomplish. It may also require refraining from making public promises that solutions will deliver, to be colloquial, “all that and a bag of chips.” Rough justice that is actually doled out may ultimately produce better outcomes for the population to be helped. Exposing the pretend-solution problem sets up the challenge for additional thinking about outcome assessment and data collection in program design.

## VI. Conclusion

The data from this study reveal the serious failures of Chapter 13 bankruptcy. There is no longer a vacuum of knowledge that permits alternative theories to excuse away the realities of Chapter 13 outcomes. Nearly all of the two in three families that file Chapter 13 and later drop out of their repayment plans do so in precarious financial straits. The majority of homeowners seem poised to lose their homes, and families are already experiencing an uptick in collection pressure. These families still owe their unsecured debts, and they are out of ideas and options. Some families may file another bankruptcy, some may simply avoid collectors for years, and some will simply tumble down the socioeconomic ladder, losing homes, cars, and their aspirations for middle-class prosperity. Admitting that Chapter 13’s success rate truly is less than half is a crucial first step to generating a new bankruptcy system that is simpler, cheaper, and more effective. If the pretend solution stays in place, another entire generation will need to heed the advice of the Chapter 13 debtor who warned,

Be prepared for a rocky road. It’s not an easy thing to go through. It’s a longer process than what we thought it would be and there [are] unbelievable amounts of paperwork. We had creditors telling us that bankruptcy wouldn’t solve our problems. We wanted to believe it would help us, but maybe they were telling us the truth.<sup>225</sup>

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225. Interview with Respondent W2-075N.